Registered No. B. 2.

VOL. XXXII.] [PART I.



THE INDIAN LAW REPORTS.

1908.

JANUARY 1.

(Pages 1 to 49.)

BOMBAY SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY AND BY
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council ... ... J. V. WOODMAN (*Middle Temple*)
High Court, Bombay ... L. J. ROBERTSON (*Middle Temple*).

BOMBAY:
INTED AND PUBLISHED AT THE GOVERNMENT CENTRAL PRESS
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

TABLE OF CASES REPORTED.

ORIGINAL CIVIL.

APPELLATE CIVIL.

CRIMINAL REFERENCE.

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CONTRACT ACT (IX OF 1872), SEC. 16—*Undue influence—Urgent need of money—Loan borrowed by a person in urgent need of money—Promise to pay a time-barred debt—Unfair and unconscionable bargains—Fraud—Coercion—Equity.*] The defendant, a karkun in the Government service, being heavily indebted and being very much harassed by his creditors, applied to the plaintiff for a loan on a mortgage The plaintiff agreed to lend provided the defendant executed a *khata* for the payment of Rs. 307-4-0, originally due by the latter's father but which

27th August 1901. Upon the promissory note the present suit was brought.

the defendant. On appeal:—

Held, that the plaintiff's claim ought to be allowed in full. If, according, to law, a promise to pay a debt barred under the Statute of Limitations is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor because the latter has been deprived of the use of his money and the debtor has had the benefit of it.

Under section 16, clause 1, of the Indian Contract Act (IX of 1872), when two persons enter into a contract, first, there must be subsisting between them

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Per CHANDAVARKAR, *J.*—The Mámlatdárs' Courts Act (Bombay Act II of 1906) is a remedial measure and must be liberally construed so as to advance the remedy.

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MASTER AND SERVANT—*Emigration Act* (*XXI of* 1883), *sec* 107—*Servant offending under the Act in the course of his master's employment for his master's benefit—Master's liability*] If a servant having been appointed as an agent for

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law.

EMPEROR *v* HAJI SHAIK MAHOMED ... ... (1907) 32 Bom. 10

MORTGAGE—*Mortgage by a Hindu widow without legal necessity—Destruction of property by fire—Mortgagees rebuilding the property—Suit by reversioner at widow's death to recover possession of property—Mortgagee not entitled to claim repairs or to remove the construction before delivering possession.*] A Hindu widow inherited a shop from her son and mortgaged it without any legal necessity recognised as such by Hindu law. The property having been destroyed by floods, the mortgagees rebuilt it with their own money. At the widow's death, the reversioner sued to recover possession of the property free from all incumbrances.

Held, that the mortgagees spent the money while holding the property under a mortgage not binding on the reversioner, and what they did must be presumed in law to have been done unauthorizedly so far as that reversioner was concerned.

Held, further, that the building having been treated by the mortgagees as property mortgaged to them by the widow without legal necessity, there was no equity arising in their favour as against the reversioner, who was entitled to recover it in the condition in which it was when the widow died.

THE

INDIAN LAW REPORTS,

Bombay Series.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

WADIA, GANDHY & Co. (PLAINTIFFS) v. PURSHOTAM SIVJI (DEFENDANT).

1907. *April* 17

Limitation Act (XV of 1877), Art. 178—High Court Rule 859—Application for enforcement of payment of costs by a solicitor against his client is not an application under the Civil Procedure Code—Art 178 applies only to applications under Civil Procedure Code (Act XIV of 1882).

There is no period of limitation provided for an application by an attorney for payment of his costs under rule 859 of the High Court Rules. Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code. *Bai Manekbai* v. *Manekji Kavasji* (1) followed.

THIS was a summons taken out by Messrs. Wadia, Gandhy & Co., a firm of solicitors, on 11th March 1907, against Purshotam Sivji, calling upon him to show cause why he should not pay the balance of their taxed costs in the three suits mentioned in the summons. The said Purshotam Sivji by his affidavit claimed that as the items in two of the bills were dated March and April 1900, respectively, the bills were time-barred.

Inverarity for Purshotam Sivji showed cause. He relied on Article 178, Limitation Act.

Scott, Advocate General, for Messrs. Wadia, Gandhy and Co.:—

(1) (1880) 7 Bom. 213.

separate summonses, and I think this procedure is manifestly for the advantage of the respondent as the result is a great saving in costs. I can see nothing objectionable in the procedure adopted by the applicants and I hold that the form of procedure adopted is perfectly proper.

In support of his second contention Mr. Inverarity relies on Article 178 of the Limitation Act and contends that the present application comes under the provisions of that article. Article 178 of the present Limitation Act (XV of 1877) provides a period of limitation for applications for which "no period of limitation *is provided elsewhere in this schedule or by the Code of Civil* Procedure, section 230." There is no specific provision in the Limitation Act or anywhere else fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client by the summary method provided by rule 859, and Mr. Inverarity contends that this application comes within the article he relies on. The question for consideration therefore is whether the present application falls under Article 178 of the Limitation Act. Article 84 provides a period of limitation for suits by an attorney for his costs. Rule 859 provides a method of recovering costs from a client quite independently of a suit and it gives discretion to the Judge hearing the summons to refer parties to a suit. This rule came into operation on the 1st day of January 1902, but it is by no means a new rule, for the same rule, though in a different form, has been in existence ever since 1825, as appears from the report of certain proceedings in Chambers before Mr. Justice Bayley in the case of *Abba Haji Ishmail* v. *Abba Thara*[1].

It appears from the report that Mr. Judge, who had acted as attorney for the defendant in that suit, applied for and obtained a summons in Chambers under rule 149 of the Common Law Rules of the Supreme Court of Bombay, calling upon his client to show cause why he should not pay the balance due upon an allocatur of the taxing master and why in default of such payment an attachment should not issue against his person and property. The defendant's attorney pleaded limitation and

[1] (1876) 1 Bom. 253.

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In *Abba Haji Ishmail* v. *Abba Thara* (1) it was held by Bayley, J., and confirmed by the Appeal Court, that the Limitation Act applies to a suit only and not to an application by a solicitor calling upon a party to a suit to show cause why he should not pay his solicitor's costs, and he also held that there was no limitation prescribed for such a summary application. It has been held in *Bai Manekbai* v. *Manekji Kavasji* (2) that Article 178 applies to applications under the Civil Procedure Code only. The present application is under the High Court Rules: see rule 869 under which an attorney can apply for an order like the present after getting his costs taxed, and it has been ruled in *Ramhari Sahu* v. *Madan Mohan Mitter* (3) that the law of limitation does not apply to an application under the rules of the Court.

This case was overruled on the main issue in *Fatimunnissa* v. *Deoki Pershad*,(4), but the point of the Limitation Act not affecting High Court Rules was left untouched.

DAVAR, J.—This is a summons obtained by Messrs. Wadia, Gandhy & Co., attorneys of this Court, on the 11th of March 1907, against their client Purshotam Sivji, calling upon him to show cause why he should not pay to them the sum of Rs. 1,764-2-0 being the balance of taxed costs payable by him in respect of three suits in which he employed them as his attorneys. This application is made under rule 859. The sum claimed is due by the respondent Purshotam Sivji to his attorneys under three allocaturs, copies whereof are annexed to the affidavit of their clerk Paul Phillip Pereira.

Mr. Inverarity, on behalf of Purshotam Sivji, resisted this application on two grounds. He contended that the applicants were not entitled to proceed by one summons in three different suits and that the claim was barred by the law of Limitation.

I see no force in the first objection. Although the sum claimed is made up of three smaller sums due in three suits, the respondent is not prejudiced by the applicants consolidating their claim and applying by one summons instead of taking out three

(1) (1876) 1 Bom. 253.
(2) (1880) 7 Bom. 213.
(3) (1895) 23 Cal. 339.
(4) (1896) 24 Cal. 350.

separate summonses, and I think this procedure is manifestly for the advantage of the respondent as the result is a great saving in costs. I can see nothing objectionable in the procedure adopted by the applicants and I hold that the form of procedure adopted is perfectly proper.

In support of his second contention Mr. Inverarity relies on Article 178 of the Limitation Act and contends that the present application comes under the provisions of that article. Article 178 of the present Limitation Act (XV of 1877) provides a period of limitation for applications for which "no period of limitation is provided elsewhere in this schedule or by the Code of Civil Procedure, section 230." There is no specific provision in the Limitation Act or anywhere else fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client by the summary method provided by rule 859, and Mr. Inverarity contends that this application comes within the article he relies on. The question for consideration therefore is whether the present application falls under Article 178 of the Limitation Act. Article 84 provides a period of limitation for suits by an attorney for his costs. Rule 859 provides a method of recovering costs from a client quite independently of a suit and it gives discretion to the Judge hearing the summons to refer parties to a suit. This rule came into operation on the 1st day of January 1902, but it is by no means a new rule, for the same rule, though in a different form, has been in existence ever since 1825, as appears from the report of certain proceedings in Chambers before Mr. Justice Bayley in the case of *Abba Haji Ishmail* v. *Abba Thara*[1].

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(1) (1876) 1 Bom. 253.

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WADIA, GANDHY & Co. v. PURSHOTAM.

the learned Judge seems to have deemed the point of some importance, for he intimated to the parties his desire to have the point argued before him by counsel. This was done and in the result his Lordship has delivered a considered judgment wherein he held that the application, such as was before him, was not a suit within the meaning of the Limitation Act IX of 1871, which was then in force, and that the application was not barred by any law of Limitation then in force in British India. It is important to note here, as appears from the last paragraph of the report, that Mr. Justice Bayley's judgment came before the Appeal Court consisting of Westropp, C. J., and Sargent, J., and they expressed an emphatic opinion endorsing the correctness of Mr. Justice Bayley's order. The wording of rule 149 of the Common Law Rules of the late Supreme Court is very similar to the wording of our present rule and the judgment of Mr. Justice Bayley was delivered on the 15th of July 1876. The present Limitation Act came into force on the 1st of October 1877. Article 178 is new and Mr Inverarity argued that the new article was intended to apply to an application such as the present one and was in all probability introduced into the new Act in consequence of the judgment of Mr Justice Bayley.

It seems to me, however, more probable that if the attention of the Legislature was called to this judgment, and if it was thought necessary to provide a period of limitation for applications of this description, the Legislature would have made specific provision and would not have been content merely to introduce an article making a general provision for applications for which no period of limitation is provided elsewhere in the schedule or by the Civil Procedure Code, section 230 If the matter had merely rested here, the question now before me may have been arguable or open to some doubt. That Article 178 does not apply to the present application, but is limited to applications under the Civil Procedure Code, as contended by the Advocate General who appeared for the applicants, is established by the ruling of the Appellate Court consisting of Chief Justice Sir Michael Westropp and Mr. Justice Melvill in the case of *Bai Manekbai v. Manekji Kavasji* [1]. The learned Judges there express their

[1] (1880) 7 Bom 213.

opinion in clear and unmistakeable terms that Article 178 of schedule II, Act XV of 1877, is limited to applications made under the Code of Civil Procedure.

It cannot, I think, with any show of reason be contended that this is an application under the Civil Procedure Code. There is no provision whatever in the Code entitling the applicants to adopt the summary proceedings they are authorised by rule 859 to adopt for the purpose of enforcing their claim for costs against their client. The proceedings are not akin to a suit. It is an application based on the authority of the taxing master's allocatur and is dealt with usually in a summary manner by the Judge in Chambers. The rule itself makes a distinct provision for referring the parties to a suit and this course the Judge in Chambers would, I apprehend, adopt if the client set up some special contract or arrangement with his solicitor which the solicitor denied or where, for instance, the client pleaded payment or satisfaction which was not admitted or where, generally speaking, the client disclosed a defence in showing cause which would necessitate the taking of oral evidence.

It was argued before me that even assuming that Article 178 applied only to applications under the Civil Procedure Code, this was an application under the Code because the rules were framed under the power conferred on the High Court by section 652 of the Civil Procedure Code. Section 652 empowers the High Court to "make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence" and the third paragraph of the section empowers a High Court established under Statute 24 & 25 Vic., c. 104, "to make such rules consistent with the Letters Patent establishing it, to regulate its own procedure in the exercise of its Original Civil Jurisdiction, as it shall think fit." Clause 37 of the Amended Letters Patent of the High Court of Judicature for the Presidency of Bombay, however, confers on the *High Court* much larger and wider powers, for it ordains that "it shall be lawful for the said High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating *all proceedings* in Civil cases which may be brought

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before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Intestate, and Matrimonial Jurisdiction respectively" and the High Court in making such rules and orders is directed to be guided *as far as possible* by the provisions of the Code of Civil Procedure.

A glance at the Table of Contents of our Rule Book would show I think that the rules made by the High Court are made under the larger power to make rules and orders conferred on the High Court of Bombay by clause 37 of its Amended Letters Patent.

Rule 859 is one of the rules under Chapter 38 which is headed "Miscellaneous Matters" It is not a rule merely "to regulate any matter connected with its own procedure" as contemplated by section 652 of the Civil Procedure Code. It provides a speedy and summary procedure in favour of an officer of this Court against the party who employs him and it empowers the Judge in Chambers to give effective relief to the applicant by making an order which operates as a decree for money without going through all the formalities of a suit. This is a rule quite outside the provisions of the Civil Procedure Code, and I am of opinion that an application under this rule is not an application under the Civil Procedure Code.

On the day following the day on which the summons was argued before me by counsel the applicant's solicitor drew my attention to a case—*Ramhari Sahu* v. *Madan Mohan Mitter* (1). In that case it was held that the law of limitation did not apply to an application under the rules. The respondent's solicitor drew my attention to the report of a judgment of the Full Bench of the Calcutta Court in a subsequent case—*Fatimunnissa* v. *Deoki Pershad* (2), wherein they overruled this case so far as the main point in the case was concerned, but the Full Bench has expressed no dissent from the view taken by the Judges as to the non-applicability of the law of limitation to applications under the rules of the Court.

In the view I take of this matter it is quite unnecessary to discuss the other questions argued before me as to when the

(1) (1895) 23 Cal. 339. (2) (1896) 24 Cal. 350.

solicitor's employment terminated and which of their bills or what portion of their bills of costs are barred.

After a careful consideration of all the arguments addressed to me I have come to the conclusion that there is no period of limitation provided for an application under rule 859, that Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code, that the application before me is not an application under the Code of Civil Procedure, and that Article 178 does not bar the claim made in the summons.

I make the summons absolute and direct the respondent Purshotam Sivji to pay the applicant's costs of the summons. I certify that this was a fit case for the employment of counsel.

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

LAXMANA KOM BASAPPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 3, 4 AND 5), APPELLANTS, v. RAMAPPA BIN YALLAPPA KUCHRADDIYAVAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS.*

Limitation Act (XV of 1877), schedule II, article 119—Adoption—Period of Limitation applicable to suits where factum *and also validity of adoption is denied.*

Suits in which either the *factum* or validity of an adoption is denied are governed by the provisions of article 119 of schedule II to the Limitation Act (XV of 1877).

The observations to the contrary in *Ningawa* v. *Ramappa* (1) and *Shivram* v. *Krishnabai* (2) dissented from.

Shrinivas v. *Hanmant* (3) followed and applied.

APPEAL from an order passed by T. D. Fry, District Judge of Dharwar, reversing the decree passed by, and remanding the suit to, V. G. Kaduskar, Subordinate Judge at Haveri.

* Appeal No. 8 of 1907, from order.

(1) (1903) 28 Bom. 91; 5 Bom. L. R. 703. (2) (1906) 31 Bom. 80; 8 Bom. L. R. 897.

(3) (1899) 24 Bom. 260.

1907.

LAKSHMAVA v. RAMAPPA.

Suit by the plaintiff, as the adopted son of one Yellappa, to recover property belonging to the latter.

Yellappa had two wives at his death: Dyavakka (defendant No. 1) and Yallawa (defendant No. 2). The plaintiff alleged that after Yellappa's death, his widow Yallawa adopted the plaintiff in 1890. The widows then changed their mind and divided the property between themselves in 1894.

The plaintiff filed this suit in 1901.

The defendants denied the fact of plaintiff's adoption.

The Subordinate Judge dismissed the plaintiff's claim on the ground that it was barred by limitation. His reasons were as follows:—

"Plaintiff's adoption is alleged to have taken place in 1890 and he has dated his cause of action in his plaint to have occurred in 1894. He evidently urges that the two widows ignoring his adoption divided the property among themselves in 1894 and began to enjoy the property separately. Subsequently when he applied for the transfer of the khata to his name defendant No. 1 openly denied the right of the plaintiff to the transfer of the khata disputing his adoption, and the revenue authorities did not allow his application saying that the plaintiff's adoption is disputed. That was in March 1897, and the plaintiff did not bring his suit within six years from that time even. His adoption to his knowledge as is evident from the revenue proceedings was disputed in 1893 and his claim now to have the adoption established and to have the property given to him is clearly time-barred. It is evident he cannot succeed except through his adoption which he ought to have established in six years from the time it was disputed The claim is clearly beyond time."

On appeal this decree was reversed by the District Judge. The learned Judge remanded the case to the Subordinate Judge for its disposal on merits. He stated his grounds as follows:—

"The Subordinate Judge dismissed the suit as time barred on the ground that the plaintiff had failed to sue within six years of the denial of his adoption in 1893. In dismissing the suit on this ground the Subordinate Judge appears to have applied article 119 of schedule II of the Limitation Act, but that article does not apply to a case where (as in the present suit) the *fact* as opposed to the *validity* of an adoption has been denied (*Ningawa* v. *Ramappa*, 28 Bom. 94; *Shivram* v. *Krishnabai*, 8 Bom. L. R. 897). The suit is, therefore, not barred by this article."

The defendants appealed to the High Court, contending *inter alia* that the cases relied upon by the lower appellate Court

merely expressed an *obiter dictum* on the question and were therefore not binding.

S. R. Bakhale, for the appellant.

K. H. Kelkar, for the respondent.

CHANDAVARKAR, J.—There are no doubt observations in the judgments of this Court in the two cases *Ningawa* v. *Ramappa*[1] and *Shivram* v. *Krishnabai*[2] referred to by the District Judge which support the view that article 119 of schedule II to the Limitation Act does not apply to a suit in which the *fact* as opposed to the *validity* of an adoption has been denied. But those observations in each of the judgments in question are mere *obiter dicta* and, having reconsidered them more carefully, we have come to the conclusion that there is no difference in point of principle between articles 118 and 119 and the considerations that have been held by the Full Bench in *Shrinivas* v. *Hanmant*[3] to apply to the former article apply equally to the latter. We agree with the decision to that effect of the Madras High Court in *Ratnamasari* v. *Akilandammal*[4]. One of the learned Judges who decided that case (Bhashyam Ayyangar, J.) dissented from the rest upon the ground that both articles 118 and 119 applied only to suits for a bare declaration and not to suits for possession. But he and they were all agreed on the point that the difference in language between the two articles, on which the observations in the judgment in *Ningawa* v. *Ramappa*[1] proceed, made no difference between them in point of suits for a bare declaration and suits for possession, and that the same considerations should apply to both in that respect. As pointed out by Bhashyam Ayyangar, J., in his judgment in the Madras case just referred to, "unlike article 118, article 119 does not separately provide for a suit to obtain a declaration that an alleged adoption in fact took place, for the simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption is also valid. A plaintiff, therefore, will have to sue for a declaration that his adoption is valid, whether the *factum* itself is denied or the *factum* is admitted but the validity is challenged."[5]

(1) (1903) 28 Bom. 91.
(2) (1906) 31 Bom. 80; 8 Bom L. R. 897.
(3) (1899) 24 Bom. 260.
(4) (1902) 26 Mad. 291.
(5) (1902) Ibid, p. 311.

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LAXMANA v. RAMAPPA.

We must, therefore, reverse the order of the District Court and remand the appeal to that Court for disposal according to law. Costs to abide the result.

Order reversed.

R. R.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1907. *August 22.*

EMPEROR *v.* HAJI SHAIK MAHOMED SHUSTARI.*

Emigration Act (XXI of 1883), section 107—Servant offending under the Act in the course of his master's employment for his master's benefit—Master's liability—Artizan—Engine driver on board a steamer.

If a servant having been appointed as an agent for a particular business by his master, enters into an agreement in connection with that business every thing which he does within the scope of his employment for that purpose will be binding upon the master and the master will be criminally liable for such act of the servant under the Indian Emigration Act (XXI of 1883). In such a case the master's express knowledge of or consent to the act is not necessary, because by the very fact of the appointment of the servant as an agent in such a business, the master's knowledge of or consent to every act done by the servant or agent within the scope of his employment is implied by law.

A person engaged to drive an engine on board a steamer is an artizan within the meaning of the term as used in section 107 of the Indian Emigration Act, 1883.

THIS was a reference made by A. H. S. Aston, Chief Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The facts as stated by the Magistrate in his letter of reference were as follows:—

The accused was charged with an offence made punishable by section 111 of the Indian Emigration Act (XXI of 1883), in that he without having first obtained the consent of the Protector of Emigrants, on or about the 26th May 1907, did cause two natives

* Criminal Reference No. 51 of 1907.

of India to depart by sea out of British India under an agreement that they should work as engine drivers on board a steamer at Marmora.

The evidence showed that the accused's firm received a letter from Marmora giving certain information. Accused's servant Mahomed Hussan Yusuf Shustari showed the letter to his master, who, he said, read it and returned it to him without any express instructions. Mahomed Yusuf thereupon engaged Mahomed Ismail and Mustafa Ahmed to depart by sea out of British India to work as engine drivers on Rs. 100 a month on board steamships at Marmora.

Chunilal, the Mehta of the firm, bought the tickets and Mahomed Alli under instructions from Mahomed Yusuf saw the men off.

Mahomed Yusuf before entering into the agreements abovenamed did not obtain the permission of the Protector of Emigrants.

The following questions were referred to the High Court:—

1. Has a Presidency Magistrate jurisdiction to try an offence punishable under section 111 of Act X of 1902?

2. Is a master liable under the Indian Emigration Act X of 1902 for an agreement entered into by his servant, in the ordinary course of business, without the master's knowledge or consent?

3. Is a person engaged to drive an engine on board a steamer at a wage of Rs. 100 a month an artizan within the meaning of the Act?

R. B. Paymaster and *Ratanlal Ranchhoddas*, for the accused:—We say that an engine driver on board a steamer is not an 'artizan' within the meaning of section 107 of the Indian Emigration Act, 1883. The Act originally extended to labourers only: and by an amending Act of 1902, its provisions were applied to artizans and other persons. The term 'artizan' is nowhere defined. It occurs in article 7 of the Limitation Act (XV of 1877), where it is spoken of as 'wages of artizan.'

In other enactments of the Indian Legislature the term 'artificer' is used: see Act XIII of 1859 section 492 of the Indian Penal Code (Act XLV of 1860).

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LAXMANA v. RAMAPPA.

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Order reversed.

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EMPEROR v. HAJI SHAIK MAHOMED.

The term 'artizan' is mentioned as synonymous with 'artificer' by Stroud: see Judicial Dictionary, Volume I, page 121. The exact significance of each term is described by Chatterji, J., in *Imam-ud-din* v. *Hurmazjee*[1].

The term 'artizan' appears in Artizans and Labourers Dwellings Act (31 and 32 Vic., c. 170), and Artizans and Labourers Improvement Act (38 and 39 Vic., c. 36). The term 'artificer' is employed in Hosiery Manufacture (Wages) Act (37 and 38 Vic., c. 48).

Thus, we find artizans always associated with labourers and their earnings are spoken of as 'wages.' The test is whether manual labour is involved. An engine driver on board a steamer has no manual labour to perform: his duty consists in directing the men under him.

M. B. Chaubal (Government Pleader), for the Crown:—The Dictionary meaning of the term 'artizan' is 'one who practises an art or an applied science.' A skilled workman would be an artizan. An artizan must combine some skill and some manual labour. The mere fact that he has men working under him does not alter the fact. An artificer is described as one who *makes* something, as distinguished from one who only *does* something. (Stroud's Judicial Dictionary, Volume I, page 120.)

The amendment of the Emigration Act in 1902 was passed mainly with a view to bring even those persons within its provisions who were not previously protected. It was extended to skilled workmen. The most obvious meaning of the term 'artizan' is one who is employed in any mechanical work.

PER CURIAM:—Following the judgment of this Court in Criminal Application for Revision No. 152, *Emperor* v. *Jeevanji*[2], decided on 7th August 1907, our answers to the first and the second question are in the affirmative. We should add with reference to the second question, that, if a servant, having been appointed as an agent for a particular business by his master, enters into an agreement in connection with that business, everything which he does within the scope of his employment for that

(1) (1904) 39 P. R. 71, Cr. (2) (1907) 31 Bom. 611; 9 Bom. L. R. 907.

purpose will be binding upon the master and the master will be criminally liable for such an act of the servant under the Indian Emigration Act. In such a case the master's express knowledge of or consent to the act is not necessary, because from the very fact of the appointment of the servant as an agent in such a business, the master's knowledge of or consent to every act done by the servant or agent within the scope of his employment is implied by law.

The third question referred by the Chief Presidency Magistrate is :—

"Is a person, engaged to drive an engine on board a steamer at a wage of Rs. 100 a month, an artizan within the meaning of the Act?"

There is no definition of the term 'artizan' in the Act itself, nor, so far as we have been able to look into the cases, is there any definition of it in any other co-temporary Act of the Legislature; we must interpret it in the conventional sense in which it is used. An 'artizan' is defined by Webster in his dictionary to be one who is engaged in a mechanical employment. That is the popular meaning and there is no reason to suppose that the Legislature meant to use it in any other sense. Having regard to that meaning of the term, a person engaged to drive an engine on board a steamer would be included within it. It is urged before us by Mr. Paymaster, the learned pleader for the accused, that a person engaged not to work but to superintend and control others engaged in a mercantile employment is not within the meaning of the term as used in the Act. That, however, is not the question referred to this Court. Our answer to the third question referred is also in the affirmative.

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was *ultra vires* as affecting the provisions of the Limitation Act. A *rule nisi* was therefore issued, requiring the opponent (original defendant-respondent) to show cause why the order of the Registrar should not be set aside. The question was argued before a Full Bench consisting of Russell, C. J. (Acting), and Chandavarkar, Heaton and Knight, JJ.

L. A. Shah appeared for the applicants (original plaintiffs-appellants) in support of the rule:—We presented the second appeal in time, that is, on the 6th April 1907, with the certified copies of the judgment and decree of the lower appellate Court and of the decree under execution. A certified copy of the order of the first Court in execution and the certified copies of the decrees of the two appellate Courts in the original suit were filed on the 10th June 1907 as required by clauses (2) and (3) of Rule 25 of the High Court Rules. The Registrar directed the second appeal to be returned as time-barred under Rule 17, treating it as presented on the 10th June 1907 when the remaining copies were filed. The Registrar's endorsement is in accordance with the long-standing practice of the office. The question is whether the non-compliance with the said rule within the time prescribed by the Law of Limitation involves the consequence that the appeal is time-barred. The question is raised in view of the recent decision in *Ramchandra* v. *Laxman*[1]. Under Article 152, Schedule II, of the Limitation Act the period prescribed for the presentation of an appeal is ninety days. The term "appeal" is not defined anywhere. But it can at the most be taken to mean a memorandum of appeal with the accompaniments required by the Civil Procedure Code. Section 541 of the Code requires only a copy of the decree and a copy of the judgment of the appellate Court to be produced. The Limitation Act of 1877, which was passed about the time when the Code of 1877 came into force, should be taken to refer to the appeal as contemplated by the Civil Procedure Code. Sections 5 and 12 of the Limitation Act refer to copies as required by the Code and provide only for the deduction of time spent in obtaining copies of the judgment and decree under appeal. The rule in question, though

(1) (1906) 31 Bom. 162.

it does not purport to have been made under any specific power, must be taken to have been framed under section 652 of the Civil Procedure Code or under clause 37 of the Amended Letters Patent. The High Court can frame rules to regulate the proceedings coming before it, and Rule 25 provides for the production of certain copies in certain appeals and other proceedings, but it does not provide for the consequences arising from the non-compliance with it. The rule occurs in the chapter containing rules for the guidance of the Registrar's office. There are some rules in that chapter which are in imperative terms, but the non-observance thereof does not entail any consequences. There is nothing to show that the non-observance of this particular rule was intended to have such serious consequences as the Registrar has attributed to it. There is nothing to show that it was ever intended by that rule to supplement the provisions of the Civil Procedure Code so as to affect the rule of Limitation laid down by the Code. The Registrar may refuse to register the appeal under Rule 17 unless and until the copies required by the High Court Rules are produced, but he has no power under the rule to treat the appeal as time-barred if the appeal as contemplated by the Limitation Act and Civil Procedure Code is in time even without the copies required by the rules. Apart from the rule it is clear that section 587 of the Civil Procedure Code, which renders the provisions of Chapter XLI regarding appeals from original decrees applicable as far as may be to second appeals, would not affect the matter in any way. The ruling in *Pirathi Sing* v. *Vencatramanayyan*[1] is clear on the point. The words "as far as may be" cannot be so construed as to give to section 541 of the Code an extended meaning. In fact, it is just because the copies now in question would not be necessary under the Code, the High Court framed the rule. The object of section 587 of the Civil Procedure Code is to avoid repeating some of the provisions relating to first appeals in the chapter relating to second appeals. We rely upon the ruling in *Ramchandra* v. *Laxman*[2], the *ratio decidendi* of which is applicable to the present case. Though that ruling was under Article 179 of the Limitation

(1) (1881) 4 Mad. 419. (2) (1906) 31 Bom. 162.

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Act, and the present case falls under Article 156, still the principle that extraneous accompaniments should not be treated as forming part of the principal documents contemplated by the said articles applies to both of them, and so far we submit that the said decision is an authority in our favour.

Lastly, Rule 25 does not provide for the deduction of time taken up in obtaining copies required under it. Under section 12 of the Limitation Act a party would be entitled to the deduction of time only in respect of the copies required by the Civil Procedure Code. If the High Court intended to attribute any such consequence to the non-production of the copies required by Rule 25 as the Registrar has attributed to it, it would have taken care to provide for the deduction of time taken up in obtaining the said copies. Thus, by treating our second appeal as time-barred the rule is so interpreted as to affect the provisions of the Limitation Act, for which there is no warrant. We, therefore, submit that the rule is *ultra vires* of the High Court. The High Court has no power to frame rules which would in any way modify or affect the provisions of the Limitation Act or the Civil Procedure Code.

G. N. Thakore appeared for the opponent (defendant-respondent) to show cause:—Section 652 of the Civil Procedure Code confers upon the High Court the power to frame rules to regulate any matter connected with its procedure. Section 587 of the Code modifies the applicability to second appeals of the provisions of Chapter XLI of the Code, the qualification being indicated by the words "as far as may be" occurring in the section. Section 632 again enacts that the provisions of the Code will apply to the High Courts "except as provided in section 652." From the language of these sections it is clear that the Legislature contemplated that any of the provisions of Chapter XLI of the Code could be modified or even new provisions substituted by a rule framed by the High Court under section 652. The provisions contained in such a rule acquiring by section 652 of the Code the force of law it becomes in effect a provision of the Code itself.

As to the objection that section 12 of the Limitation Act provides for the exclusion of time only in reference to a copy of

the decree appealed against and the judgment on which it is founded, we submit that in practice the time taken up in obtaining other copies is invariably excluded. The High Court Rules would, no doubt, have been more perfect if they had expressly provided for such an exclusion, but owing to the existence of the practice parties are not prejudiced by the operation of the rule; see *Fazal Muhammad* v. *Phul Kuar*[1], *Gopal Chandra* v. *Preonath Dutt*[2].

The ruling in *Pirathi Sing* v. *Vencatramanayyan*[3] has been relied on, but we submit that it has no application, it being evident that it did not proceed to construe the effect and operation of a rule as in the present case. The decision in *Sadashiva* v. *Ramchandra*[4], than which the present case is even stronger, lays down the correct interpretation.

The rulings in *Ramchandra* v. *Laxman*[5] and *Pachiappa Achari* v. *Poojali Seenan*[6] are distinguishable, and the former ruling requires to be reconsidered. In the first place, these cases relate to the construction of provisions in the circulars issued for the Subordinate Courts. Secondly sections 587 and 632 not being applicable to such circulars the latitude, which the operation of these sections leaves to the High Court in framing rules for itself, may not be deemed to be open to it when framing rules for the Subordinate Courts. Thirdly, they are decisions upon the wording of Article 179 of the Limitation Act which the Courts have in a series of decisions construed with a peculiar regard for the interests of the executing decree-holders.

Further, the reasoning of the cases relative to accompaniments being regarded as extraneous to the appeal or application, etc., would equally apply to cases under section 541 of the Civil Procedure Code, as regards which the authorities are all agreed.

It was argued that if Rule 25 be so construed as to affect the provisions of the Limitation Act, it is *ultra vires*. We submit that the rules framed under section 652 of the Civil Procedure Code have to satisfy two conditions, namely, they must be con-

(1) (1879) 2 All. 192.
(2) (1901) 32 Cal. 175.
(3) (1881) 4 Mad. 410.
(4) (1903) 5 Bom. L. R. 394.
(5) (1906) 31 Bom. 162.
(6) (1905) 28 Mad. 557

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sistent with the Code, and they must be connected with the Court's procedure. Rule 25 is admittedly not inconsistent with the Code. The second condition is to be satisfied in the sense in which the Civil Procedure Code satisfies it, the language of the preamble of the Code being almost similar to the language of section 652. It was conceded by implication that the provisions of the Code can affect limitation, section 541 of the Code being an instance. How can it be said then that because Rule 25 similarly affects the question of limitation incidentally, it was *ultra vires* of the High Court to have framed it?

Clause 37 of the Amended Letters Patent is wider. The term employed there is "proceedings" instead of "procedure" which occurs in section 652. The rule is therefore not *ultra vires* even if it be deemed to have been framed under the said clause.

Further, the rules framed by the High Court are to be assumed to possess a legal origin even where the ultimate origin cannot be traced: *Naubat Ram* v. *Harnam Das*[1]. Therefore, every presumption should be made in favour of giving effect to the present rule.

Shah in reply:—Section 373 of the Civil Procedure Code of 1859 (Act XIV of 1859) required copies of both the judgments and decrees to be produced in second appeals. That provision is clearly modified by the Code of 1877 (Act X of 1877). Thus, the intention of the Legislature is quite manifest that these copies were not required under the Code. Section 632 of the Civil Procedure Code only lays down that the rules shall have the force of law, but it does not say that they will be treated as a part of the Code itself.

The decision in *Gopal Chandra* v. *Preonath Dutt*[2] has no bearing whatever on the present case.

RUSSELL, Ag. C. J.:—In this case it appears that the petitioners have filed a second appeal against the order, dated the 20th December 1906, in Appeal No. 399 of 1905 on the file of the District Court of Ahmedabad on the 6th of April 1907 with all the necessary copies except the certified copies of the order of the first Court and of the decree of the appellate

(1) (1886) 9 All. 115. (2) (1901) 32 Cal. 175.

Court and of the decree of the High Court in the original suit. The said certified copies of the order of the first Court and of the appellate decrees in the original suit were filed on the 10th June 1907.

The Registrar, however, directed the appeal to be returned as being beyond time.

The appeal, as presented on the 6th of April 1907, was in time, but the Registrar treated it as having been presented on the day on which the remaining copies were filed and has treated it as time-barred.

The question referred to us is whether he was right in so doing.

By Rule 17, Chapter V, Part V, of this High Court, Appellate Side, the Registrar shall admit to the register all memoranda of appeal which

(*a*) are duly stamped,

(*b*) are in the form,

(*c*) contain the particulars required by law,

(*d*) are accompanied by the necessary copies, and

(*e*) are presented within the time prescribed for the same.

The Registrar shall decide all questions under this rule, and, if he returns a memorandum of appeal, the appellant may apply to a Judge to direct registration.

Rule 18 provides that the Registrar may reject or return for amendment any memorandum of appeal for the reasons specified in section 543 of the Code of Civil Procedure.

Rule 25 (2) says: "Memoranda of second appeals or applications for the revision of appellate decrees or orders must be accompanied by copies of the decrees and judgments or orders of both the lower Courts."

(3) "Appeals in execution proceedings must be accompanied by copies of the decrees sought to be executed as well as by copies of the orders of the lower Court or Courts."

Now, in Rule 17, it will appear, there are five necessary points set out above, and by the latter part of it the Registrar is to

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sistent with the Code, and they must be connected with the Court's procedure. Rule 25 is admittedly not inconsistent with the Code. The second condition is to be satisfied in the sense in which the Civil Procedure Code satisfies it, the language of the preamble of the Code being almost similar to the language of section 652. It was conceded by implication that the provisions of the Code can affect limitation, section 541 of the Code being an instance. How can it be said then that because Rule 25 similarly affects the question of limitation incidentally, it was *ultra vires* of the High Court to have framed it?

Clause 37 of the Amended Letters Patent is wider. The term employed there is "proceedings" instead of "procedure" which occurs in section 652. The rule is therefore not *ultra vires* even if it be deemed to have been framed under the said clause.

Further, the rules framed by the High Court are to be assumed to possess a legal origin even where the ultimate origin cannot be traced: *Naubat Ram* v. *Harnam Das*[1]. Therefore, every presumption should be made in favour of giving effect to the present rule.

Shah in reply :—Section 373 of the Civil Procedure Code of 1859 (Act XIV of 1859) required copies of both the judgments and decrees to be produced in second appeals. That provision is clearly modified by the Code of 1877 (Act X of 1877). Thus, the intention of the Legislature is quite manifest that these copies were not required under the Code. Section 632 of the Civil Procedure Code only lays down that the rules shall have the force of law, but it does not say that they will be treated as a part of the Code itself.

The decision in *Gopal Chandra* v. *Preonath Dutt*[2] has no bearing whatever on the present case.

RUSSELL, Ag. C. J.:—In this case it appears that the petitioners have filed a second appeal against the order, dated the 20th December 1906, in Appeal No. 309 of 1905 on the file of the District Court of Ahmedabad on the 6th of April 1907 with all the necessary copies except the certified copies of the order of the first Court and of the decree of the appellate

(1) (1886) 9 All. 115. (2) (1901) 32 Cal. 175.

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It is now contended that such a construction of the rule is opposed to the language and spirit of the material sections, both of the Code of Civil Procedure and the Limitation Act. And in support of the contention the decision in *Ramchandra* v. *Laxman*(1) is relied upon. That decision, in my opinion, has no bearing and cannot be cited as an authority on the question now before us. It deals with the construction of the words "in accordance with law" in Article 179 of Schedule II of the Limitation Act; and those words contemplate a certain elasticity and power of variation and mean that the law is to be followed not *verbatim et literatim* but substantially. The words in fact allow a certain degree of latitude in the observance of the law: see *Thomas* v. *Kelly*(2). The question now before us is entirely different, turning as it does upon certain sections of the Civil Procedure Code and the Limitation Act with different wordings.

Dealing first with the Code, section 541, which applies to an appeal from an original decree, requires that such appeal "shall be accompanied by a copy of the decree appealed against and (unless the appellate Court dispenses therewith) of the judgment on which it is founded." That is, an appeal is to be regarded as presented if it is tendered with the two copies specified in the section. Otherwise it cannot be said to be presented at all.

Having special regard to this essential condition laid down in the Code for the due presentation of an appeal, the Limitation Act by section 12 studiously prescribes that "the time requisite for obtaining a copy of the decree appealed against" and "the time requisite for obtaining a copy of the judgment on which it is founded" shall both be excluded "in computing the period of limitation prescribed for an appeal."

The necessary implication of this is that for the purposes of limitation an appeal is presented within time, if, being accompanied by copies of the decree appealed against and the judgment on which it is founded, it has been presented within the period resulting from the mode of computation specified.

(1) (1906) 31 Bom. 162. (2) (1888) 13 App. Cas. 506.

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Now, section 587 of the Code makes section 541 applicable to a second appeal as well. Besides, in section 12 of the Limitation Act the term "appeal" is used so as to comprehend both "appeals from original decrees" and "appeals from appellate decrees." It follows from that that the necessary implication in section 12 of the Limitation Act abovementioned applying to both appeals without distinction, there is a due presentation of a second appeal if it is accompanied by copies of the decree and the judgment appealed against. The Limitation Act, read with the Code of Civil Procedure, requires no more in the case of such an appeal. It puts it on the same footing for the purposes of limitation as an appeal from an original decree. Had the intention of the Limitation Act been otherwise, had the Legislature meant that in the case of a second appeal the period of limitation must be computed by treating it as *duly presented* only when and if it is accompanied by copies of the decree and judgment of the first Court as well as by those of the second Court, there would have been express provision made for deduction of the time requisite for obtaining a copy of the decree and of the judgment of the first Court. *Expressio unius est exclusio alterius.*

To put it shortly, the solution of the question before us depends on the intention of the Legislature as it is expressed or necessarily implied in the Limitation Act. And such intention must be discovered from the words actually used, and, where they are ambiguous, from surrounding circumstances, including other laws *in pari materia* The Code of Civil Procedure is one of such laws. Applying this test, it is plain that section 12 of the Limitation Act, with which section 541 of the Code of Civil Procedure, made applicable to a second appeal by section 587 of of the same Code, must be read, treats an appeal from an original decree and a second appeal as the same for the purposes of presentation within the time prescribed for it.

If that is so, no rule of this Court can add to or modify the conditions and limitations of the law laid down in the Limitation Act. It is true that the Court has the power of making certain rules given it by section 652 of the Code of Civil

Procedure and those rules must be "consistent with" the Code. But there is no power given to frame a rule modifying any rule or mode as to computation of limitation prescribed, expressly or by necessary implication, in the Limitation Act.

Enough and legitimate room is left for the operation of the rule now under discussion after excluding it as *ultra vires* for the purposes of the due presentation of a second appeal within the period prescribed by the Limitation Act. Under rule 17 the Registrar is competent to refuse the admission of such an appeal to the register, if it is not accompanied by all the copies required by Rule 25. Though the copies of a decree and judgment of the Court of first instance are not necessary for the purpose of the presentation of a second appeal within the period prescribed in the Limitation Act, they may be and very often are necessary for other purposes. For instance, they may be required for the purpose of correctly ascertaining the amount of Court-fee leviable on a memorandum of second appeal, or they may be required for the purpose of determining whether the second appeal should be dismissed under section 551 or admitted under section 552 of the Code of Civil Procedure. Rule No. 25 must be regarded as providing for such contingencies and so far it is *intra vires* and obligatory. That being its scope, its operation must be limited to such purposes.

On these grounds I am of opinion that the rule must be made absolute.

HEATON, J.:—I agree in the conclusion arrived at.

KNIGHT, J.:—I concur.

Rule made absolute.

G. B. R.

APPELLATE CIVIL

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. September 2.

VRIJBHUKANDAS DWARKADAS (ORIGINAL PLAINTIFF), APPELLANT, v. BAI PARVATI (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Inheritance—Mother inheriting to her son takes a limited estate—Funeral ceremonies of mother—Son's religious duty to perform them—Their expenses are charge upon the son's estate—Mitákshara—Interpretation.

Under the Hindu law applicable in Bombay a mother succeeding as heir to her son takes a limited estate.

The duty of performing the funeral ceremonies of a mother, that is, *pinda-dána* or offering the funeral oblations, is laid down as a religious injunction binding on her son in absolute terms by the Hindu law. The duty is independent of any assets left by her. The expenses of performing the funeral ceremonies are, therefore, a charge on the son's estate.

According to Vijnaneshwara, where an act is directed to be done and the omission to do it is stated to be sinful, the direction imposes upon the person directed an imperative and absolute obligation to do the act.

V., a Hindu, died leaving him surviving his mother B., who succeeded to his property. B. made a will in favour of her daughter's daughter P., who succeeded to the property on her death and performed her funeral ceremonies. The plaintiff, a reversionary heir of V., alleging that B. took only a life-interest in the property, sued to recover its possession :—

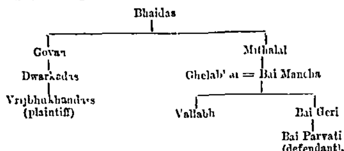
Held, that the plaintiff was entitled to recover the possession of V.'s property as V.'s heir, only on condition of fulfilling the obligation binding the estate, viz., of compensating P. for the expenses she had incurred in performing the funeral ceremonies of B.

SECOND Appeal from the decision of G. D. Madgavkar, District Judge of Broach, varying the decree passed by B. B. Kunte, Subordinate Judge at Broach.

Suit to recover possession of property.

* Second Appeal No. 716 of 1906.

The parties to the suit were related to each other as shown in the following genealogical tree :—



The property in dispute (viz., a shop) belonged to Ghelabhai, who died leaving him surviving a widow Mancha, a son Vallabh and a daughter Bai Gori. Gori died before Mancha, leaving a daughter Parvati (defendant). Vallabh died when he was six years old, since when the shop remained in possession of Bai Mancha till her death in 1900.

By her will made in 1889, Bai Mancha left the shop to defendant Parvati, who performed her funeral ceremonies and remained in possession of the shop. In 1904, Vrijbhukandas sued for possession with mesne profits as the nearest male agnate of Vallabh, claiming that Mancha had a life-interest only in the shop and could not bequeath it by will.

The defendant contended that the shop had been burnt down in 1862 in the life-time of Mancha, who re-built it at her own expense and had power to bequeath it by will for the performance of her funeral ceremonies, and that she performed Mancha's funeral ceremonies at a cost of Rs. 1,250 which the plaintiff must repay with interest before he could get possession.

The Subordinate Judge held that plaintiff was entitled to the shop on the death of Mancha (who had no power to bequeath it by will) upon payment of Rs. 175, the amount of Mancha's funeral expenses borne by the defendant.

On appeal, the District Judge held that according to Hindu Law the plaintiff is the reversioner of the property, that the funeral expenses of Mancha, defrayed by the defendant, amounted to Rs. 800, and that the plaintiff was liable to repay the same

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before obtaining possession of the property, his reasons were as follows:—

"No special custom in the caste has been made out, whereby a Pitrai is excluded by a sister's or a daughter's daughter. The ordinary rule of Hindu law applies that the mother only takes a life-interest in the immoveable property of her son predeceased without wife or children, affirmed in *Narsappa* v. *Sakharam* (6 Bom H. C 215, A C. J.), and approved of in *Madhavram* v. *Dave Trimbaklal* (I. L. R. 21 Bom. 745) and in *Gandhi Maganlal* v. *Bai Jadav* (24 Bom. 214). * * *

"The lower Court has rightly held that for this amount the property in suit of the Gotra and not the defendant's Stridhan is liable. It is hardly necessary to refer to the intimate correspondence in Hindu Law and usage between the spiritual duty of the heir especially in the matter of the funeral "Pinda" and his right of inheritance. Strictly speaking, the plaintiff should have performed Bai Mancha's funeral ceremonies rather than the defendant, just as he claims a superior right of inheritance to hers."

The plaintiff appealed to the High Court, mainly on the ground that the lower appellate Court erred in allowing the funeral expenses to the defendant, and the defendant filed cross-objections to the effect that Bai Mancha took an absolute interest in the property which she inherited from her son Vallabh.

L. A. Shah for the appellant (plaintiff):—The funeral expenses of Bai Mancha should in the first instance come out of her Stridhan. It has no doubt been held in *Ratanchand* v. *Javherchand*[1] that the funeral expenses of a widow are a charge upon her husband's estate and not upon her Stridhan. But the analogy should not be extended to the case of a mother. The ordinary rule of law that the funeral expenses should come out of the estate of the deceased should be followed.

G. K. Parekh, for the respondent—The case of a mother is certainly stronger than the case of a widow. Her funeral expenses should obviously come out of the son's estate. If the mother dies in the life-time of her son then clearly it is the son's duty to perform her funeral expenses. And when he dies his estate ought to remain liable for the fulfilment of that obligation.

I further submit, that the appellant is not entitled to succeed at all as the mother succeeding as heir to her son's property takes

(1) (1897) 22 Bom. 818.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. *September 2.*

VRIJBHUKANDAS DWARKADAS (ORIGINAL PLAINTIFF), APPELLANT, v. DAYARAM JADAVJI (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Mortgage by a Hindu widow without legal necessity—Destruction of property by fire—Mortgagees re-building the property—Suit by reversioner at widow's death to recover possession of property—Mortgagee not entitled to claim repairs or to remove the construction before delivering possession.

A Hindu widow inherited a shop from her son and mortgaged it without any legal necessity recognised as such by Hindu law. The property having been destroyed by floods, the mortgagees re-built it with their own money. At the widow's death, the reversioner sued to recover possession of the property free from all incumbrances

Held, that the mortgagees spent the money while holding the property under a mortgage not binding on the reversioner, and what they did must be presumed in law to have been done unauthorisedly so far as that reversioner was concerned.

Held, further, that the building having been treated by the mortgagees as property mortgaged to them by the widow without legal necessity, there was no equity arising in their favour as against the reversioner, who was entitled to recover it in the condition in which it was when the widow died.

Vinayakrao v. *Vidyashankar*[1], *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed*[2], and *Narayan* v. *Bholagir*[3], distinguished.

SECOND appeal from the decision of G. D. Madgavkar, District Judge of Broach, confirming the decree passed by B. B. Kunte, Subordinate Judge at Broach.

Suit to recover possession of property.

The property in dispute was the same as that in dispute in the case reported at p. 26 *supra*. The plaintiff in both the suits was the same.

In 1863, the shop in question was destroyed by fire but rebuilt by Bai Mancha.

* Second Appeal No. 681 of 1906.

(1) (1907) 9 Bom. L. R. 404. (2) (1895) 20 Bom. 298.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 80.

In 1873, Bai Mancha executed a deed of mortgage of the said shop for Rs. 675 in favour of Jadav, father of defendants 1 and 2, for a term of 99 years. Jadav on two occasions expended money on the re-construction of the shop, when it was damaged. Mancha died in 1900.

In 1904, the plaintiff claiming as the nearest male agnate of Vallabh, brought the present suit on the ground that Mancha had only a life-interest in the property, and that the defendant's mortgage was therefore void and the property must fall to him as the next reversioner.

The defendant contended *inter alia*, that Mancha had executed the deed of mortgage for a necessary purpose, and the alienation was therefore valid; and that the plaintiff could not obtain possession without repaying them Rs. 675, the mortgage amount, plus Rs. 1,300 spent by him on repairs.

The Subordinate Judge held that Mancha did not alienate the property for a necessary purpose, and that the plaintiff was entitled to its possession on payment of Rs. 800 spent by defendants on repairs, unless they elected to remove the building and vacate within a fortnight.

On appeal the District Judge arrived at substantially the same findings.

The plaintiff appealed, and the defendants filed cross-objections against the decree.

L. A. Shah, for the appellant:—The lower Court having found as a fact that there was no necessity to alienate the property, the reversioner is not bound to pay the Rs. 800 before recovering possession of the property. The mortgage was binding on the widow alone and not on the reversioner. If the widow had spent any money on repairs, she could not have claimed it from the reversioner: and the latter would be entitled to the property in the condition in which it was at the widow's death.

K. N. Koyaji, for the respondent:—I submit the present case is not one of mere repairs but one of entire destruction and re-construction. If the mortgagees had chosen not to re-build the

house, the reversioner could never have had the house with or without conditions. Moreover the plaintiff allowed the mortgagees to re-build the house on two occasions without uttering even a word of protest. The mortgagees had the right to construct the building during the life-time of the widow; and so he is entitled to the expenses thereof from the reversioner, who allowed the construction to be put up. See *Vinayakrao* v. *Vidyashankar*[1], *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed*[2], and *Narayan* v. *Bholagir*[3].

L. A. Shah, in reply :—The rulings last cited are distinguishable from the present case. In those cases, the buildings were constructed by the parties concerned in their own supposed right. Here the respondent has erected the building as a mortgagee.

CHANDAVARKAR, J.—The only question of law argued in support of this second appeal is whether the Courts below have rightly held appellant liable to pay the amount spent by respondents for "repairs" as a condition precedent to his right to recover possession of the property as the reversionary heir of the son of the deceased widow, Bai Mancha. It being found as a fact that the mortgage taken by the respondents from Bai Mancha was not for any legal necessity, justified by Hindu law, they cannot claim the amount spent by them for repairs, which must be, upon the facts found, treated as having been spent by them under the authority of the mortgage from Bai Mancha. That mortgage falling to the ground as not binding the plaintiff, there is no legal foundation for the claim for the amount spent for repairs by the respondents unless they are able successfully to invoke some principle of equity which makes it obligatory on the appellant to pay that amount to the respondent as a condition precedent to the recovery of possession. It is urged that the repairs were necessary and the appellant is benefiting from them, because had the respondents not effected them at their own expense the property would have ceased to exist. But, as has been held by the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[4], "it is not in every case in which a man has benefited by the money of another, that an obligation to

(1) (1907) 9 Bom. L. R. 434.
(2) (1895) 20 Bom. 298.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 80.
(4) (1875) L. R. 2 I. A. 131 at p. 143.

repay that money arises"......To raise an equity of that kind "there must be an obligation, express or implied, to repay." (See that decision followed in *Gadgeppa Desai* v. *Apaji Jivanrao*[1].) Here the respondents spent the money while holding the property under a mortgage not binding on the reversioners and whatever they did must be presumed in law to have been done unauthorisedly so far as those reversioners are concerned. It is urged that what the respondents did was to re-build the house after it had been destroyed by floods; but even then the respondents cannot claim higher rights than those which their mortgagor, Bai Mancha, could have claimed; and the amount spent by them on the new erection must be regarded upon the facts found by the lower Court as if it had been spent by the widow herself. Had she effected the repairs or rebuilt the property, she could not have claimed, and on her death her heir or any other person claiming under her would not have been entitled to claim, the amount from the reversioners. Had she re-built by borrowing the amount, it would have been binding on the reversionary estate only if there had been legal necessity for the purpose and the widow had mortgaged the estate therefor. But she did nothing of the kind: *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*[2]. It is not suggested in the pleadings that she could not have re-built out of money in her own hands, or that it would have been necessary for her to borrow if she had re-built herself. The respondents, therefore, have to fall back upon the defence that the estate having benefited from what they did, the appellant should not be allowed to recover it without paying for the benefit they derive; and that because, "he who seeks equity must do equity." That maxim, however, is for the reasons given and on the authority of the decisions cited inapplicable here. So far we have looked at the merits of the case from the point of view presented by the decisions of the Privy Council binding on us and based on the general principles of equity. Is there anything in the Hindu Law to raise the equity invoked by the respondents in their favour in this case? In the chapter on mortgages, pledges and deposits, Vijnaneshwara points out, in commenting on a Smriti of Yajnayavalkya, that where mortgaged property in possession of a

(1) (1879) 3 Bom. 237. (2) (1898) 25 Cal. 565 at p. 569.

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mortgagee is destroyed by fire or floods or any other act of God, the mortgagee is not responsible for its destruction and is entitled to sue at once, in spite of any terms to the contrary in the mortgage contract, for his money with interest. There is no authority, however, given to a mortgagee to re-build the property so as to bind the mortgagor against his will. Assuming that Bai Mancha assented to the re-building by the respondents, that could bind her only. But the question is—did the respondents assent? The lower Courts have answered that question in the affirmative merely on facts which raise no more than an inference of quiescence against the present appellant.

Failing on all these points, Mr. Koyajee, the learned pleader for the respondents, urges that in any event they must be allowed to remove the building they have erected before the appellant is given possession of the land. And he relies on the decisions of this Court in *Vinayakrao* v. *Vidyashankar*[1], *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed*[2] and *Narayan* v. *Bholagir*[3]. But those cases are plainly distinguishable from the present. In the first, a widow, having sold certain land in which she had only a Hindu widow's estate, the purchaser, treating the land as *his*, erected upon it a structure at his own expense. The second decision is founded on the same principle, following the decision in *Narayan* v. *Bholagir*[3]. But here the respondents erected the building not as their own but as belonging to the estate of the son of Bai Mancha, which that lady, as their mortgagor, could redeem. They must be regarded as having erected it as part of that estate; not as of their own ownership. Under those circumstances the erection having been treated by the respondents as property mortgaged to them by Bai Mancha without legal necessity, there is no equity arising in their favour as against the present appellant who, as reversionary heir to the estate, is entitled to recover it in the condition in which it was when the widow died. We must, therefore, substitute the following decree for that of the lower Court. The plaintiff do recover possession of the property in suit with costs throughout including the costs of the cross-objections.

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(1) (1907) 9 Bom. L. R., p. 404. (2) (1895) 20 Bom. 388.
(3) (1869) 6 B. H. C. R. A. C. J. 80.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GANESH NARAYAN NAGARKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU RAMCHANDRA SARAF AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1907. *September 5.*

Indian Contract Act (IX of 1872), sec. 16—Undue influence—Urgent need of money—Loan borrowed by a person in urgent need of money—Promise to pay a time-barred debt—Unfair and unconscionable bargains—Fraud—Coercion—Equity.

The defendant, a Karkun in the Government service, being heavily indebted and being very much harassed by his creditors, applied to the plaintiff for a loan on a mortgage. The plaintiff agreed to lend provided the defendant executed a *khata* for the payment of Rs 307-1-0, originally due by the latter's father but which in 1894 had been held to be time-barred in a suit brought by the plaintiff, and also for the payment of Rs. 25, the costs of that suit. The defendant accordingly on the 16th September 1895 passed a *khata* for Rs. 332-4-0, for the amount due under which the defendant finally passed a promissory note for Rs. 600 on the 27th August 1901. Upon this promissory note the present suit was brought. The Subordinate Judge held that the defendant received from the plaintiff only Rs. 28 on the 16th September 1895 of which Rs. 10 had been repaid; and passed a decree for Rs 36 (*viz.*, Rs. 18, the amount of principal, and Rs. 18 as interest). On appeal, the District Judge varied the decree by allowing plaintiff's claim to the further extent of Rs. 307-1-0; and disallowed the rest of the claim on the ground that it was vitiated by undue influence which the plaintiff exercised over the defendant. On appeal:—

Held, that the plaintiff's claim ought to be allowed in full. If, according to law, a promise to pay a debt barred under the Statute of Limitations is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor because the latter has been deprived of the use of his money and the debtor has had the benefit of it.

Under section 16, clause 1, of the Indian Contract Act (IX of 1872), when two persons enter into a contract, first, there must be subsisting between them some relation of the kind described in the section and secondly, the dominating position arising out of that relation must have been used by the party holding that position to secure an *unfair* advantage over the other party.

* Second Appeal No. 601 of 1906.

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When a man who is in urgent need of money on account of his poverty and pecuniary difficulties asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money-lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of clause 1 of section 16 of the Indian Contract Act (IX of 1872).

There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like which plainly fall within clause 1 of the section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health of the party on whom the undue influence is alleged to have been exerted are of great importance. In short, the test is, confidence reposed by one party and betrayed by the other, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves

The expresion "unfair advantage" in clause 1 of section 16 of the Indian Contract Act (IX of 1872) is used as meaning an advantage obtained by unrighteous means.

A Court of Equity will not set aside a contract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions, and showing that the defendant having been victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, varying the decree passed by H. A. Mohile, Joint Subordinate Judge at Ahmednagar.

Suit to recover a sum of money on a promissory note.

The promissory note in question was passed by the defendant, Vishnu Ramchandra, in favour of the plaintiff for Rs. 600 on the 27th August 1901. It was passed in renewal of a promissory note for Rs. 437-4-0 dated the 7th September 1898; which itself was a renewal of a *khata* (acknowledgment) for Rs. 332-4-0 dated the 16th September 1895.

At the time when the *khata* was passed the defendant was anxious to raise a loan of Rs. 480 on the security of his house. He was then a clerk in the Government service: and having been very heavily indebted and having been very much harassed by his creditors, he applied to the plaintiff for the loan. The plaintiff agreed to make the loan on the condition that the defendant should agree to pay a time-barred debt due by the defendant's father to the plaintiff. This debt was for Rs. 307-4-0. To recover it, the plaintiff had filed a suit in 1893 against the defendant; but the suit was dismissed as barred by limitation. The defendant agreed to pay this time-barred debt to which was added Rs. 25 which the plaintiff said was the amount of the costs of the abovementioned litigation. The defendant accordingly passed a *khata* for Rs. 332-4-0.

The present suit was brought in 1904.

The defendant, Vishnu Ramchandra, contended that he executed the promissory note under undue influence and that in any event under the rule of *damdupat* only a sum not exceeding the amount of the original debt should be allowed as interest.

The Subordinate Judge held that the defence of undue influence was not proved; and that on the 16th September 1895, the defendant had received only Rs. 28 in cash, of which Rs. 10 were returned by him. The Subordinate Judge therefore awarded to the plaintiff the sum of Rs. 18, the principal, and allowed Rs. 18 as interest applying the rule of *damdupat*. He passed a decree for Rs. 36 only.

The District Judge, on appeal, varied this decree, by giving the plaintiff a decree for Rs. 307-4-0. His reasons were as follows:—

"Defendant 1 was then still in Government service, and he was still pretty heavily indebted and was in fear of suits or darkhasts being brought against him. Plaintiff therefore still held a dominating position and used it to obtain an unfair advantage over defendant 1 by inducing him to pass a promissory note in renewal of the original *khata* and its successor as if the first *khata* had been given on a cash consideration bearing the usual interest.

To make the transaction unconscionable there must be some exaction which palpably shocks the conscience or offends one's sense of justice. If the plaintiff

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had made the defendant 1 pass the note for Rs. 332-4-0 in his favour without there being any rational ground (apart from defendant's necessity of raising money) for his undertaking this liability in addition to that imposed under the mortgage-deed, then the transaction might perhaps be held to be unconscionable. But here the plaintiff had what the law recognises as a moral claim—though not a legal one—to the payment of the time-barred debt of Rs. 307-4-0 in so far as it makes a promise to pay such a debt a valid contract, even without any consideration for the promise."

The plaintiff appealed to the High Court.

C. A. Rele, for the appellant:—It was an error of the lower appellate Court to hold that the transaction of 1895 was induced by undue influence within the meaning of section 16 of the Indian Contract Act (IX of 1872). The plaintiff was not then in a position to dominate the will of defendant 1. The relation of creditor and debtor had ceased to exist as plaintiff's suit to recover Rs. 307-4-0 was dismissed as time-barred. Urgent need on the part of the borrower will not of itself place the borrower in a position to be dominated by the lender. See *Rani Sundar Koer* v. *Rai Sham Krishen*(1).

Even assuming that the plaintiff was in a position to dominate the will of the defendant in 1895, it cannot be said that he was in the same position when the two promissory notes were passed in 1898 and 1901.

N. M. Samarth, for the respondents:—The monetary difficulties of defendant 1 and the fact that he was in Government service produced a temporary relation of dependence and control. The plaintiff was then in a position to dominate the will of defendant 1 and used that position to obtain an unfair advantage.

CHANDAVARKAR, J.:—The facts found by the District Judge, so far as they are material for the purposes of the point of law urged in support of this second appeal, are briefly these. The promissory note (Exhibit 27) on which this suit was brought is a renewal of the *khata* (Exhibit 25) executed by the defendant in September 1895. At that time the defendant was a Karkun on a monthly salary of Rs. 25 in the Revenue Department, and was heavily indebted. Being very much harassed by his creditors,

(1) (1906) L. R. 34 I. A. 9: 34 Cal. 150.

he turned to the plaintiff for a loan on a mortgage. The plaintiff agreed to lend, povided the defendant executed a *khata* for the payment of Rs. 307-4-0 which the latter's father had owed, but which, in 1894, had been held to be time-barred in a suit brought by the plaintiff. The plaintiff also insisted that the *khata* should include Rs. 25 for the costs he had incurred in the said suit. To this the defendant agreed, because he was then, as the District Judge observes, "obliged to raise money immediately to meet pressing liabilities," and, besides, he was afraid lest, being a Government servant, his pecuniary difficulties should come to the knowledge of his superiors and "he should get into trouble" with them.

Upon these facts the District Judge has held that when the *khata* (Exhibit 25) was executed by the defendant "the plaintiff was in a position to dominate his will" within the meaning of that term in clause 1 of section 16 of the Contract Act. Under that clause "a contract is said to be induced by *undue influence* where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other." That is, when the two persons enter into a contract, first, there must be subsisting between them some relation of the kind described, and secondly, the dominating position arising out of that relation must have been used by the party holding that position to secure an *unfair* advantage over the other party. When the defendant turned to the plaintiff for a loan on a mortgage, there was no relation subsisting between him and the defendant so as to enable the former to dominate the will of the latter. The relation of creditor and debtor, which had at one time existed, had ceased by virtue of the decree in the suit in which the plaintiff had failed to recover his debt. Both were at arm's length. The defendant was free to borrow money for his immediate necessities from any other person. It is not even suggested that the plaintiff tricked the defendant into approaching him for a loan to relieve his pressing difficulties or that the defendant reposed any confidence in the plaintiff, which the latter betrayed and by such betrayal led the defendant into the

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contract. The finding of the District Judge amounts to no more than that when the defendant sought the plaintiff's help, the plaintiff, taking advantage of the defendant's urgent need of money and his impecunious position, agreed to lend only on certain terms; but, as has been pointed out by the Judicial Committee of the Privy Council in *Sundar Koer* v. *Sham Krishen*(1), urgent need on the part of a borrower will not of itself place him in a position to be dominated by his lender, unless there are special circumstances from which an inference of undue influence can be legitimately drawn. There are no special circumstances found proved, according to the finding of the District Judge here, unless they be that the defendant, being heavily indebted, was harassed by his creditors, and was anxious to conceal his pecuniary embarrassments from his official superiors. Those special circumstances coupled with what the District Judge describes as "the inadequacy of the consideration for the *khata*" (Exhibit 27) would indeed be evidence of undue influence, if, as the result of his poverty and necessity, the defendant's mind was so incapacitated by mental distress that he was practically at the mercy of his lender and the latter was on that account able to impose upon the defendant whatever terms he chose to exact. Such a case might fall both under clause 1 and clause 2 (*b*) of section 16. It might fall under the former, because, the parties being on unequal terms on account of the mental incompetence of the borrower, there was a relation brought about between the two which gave the lender an opportunity of bringing improper pressure to bear upon the weakness of mind of the borrower and thereby dominating his will. And, as the District Judge has rightly observed in his judgment, clause 2 (*b*) is only illustrative of clause 1. But he has declined to draw any such inference of fact from the evidence. Concurring with the Subordinate Judge in that respect, he holds that "there is nothing to justify the inference that the defendant's mental capacity was affected by reason of mental distress so as to bring the case within sub-section (2) (*b*) of section 16 of the Indian Contract Act. I agree that there is no sufficient evidence to show this The

(1) (1906) L. R. 34 I. A. 9, at p. 16: 34 Cal. 150.

defendant 1 was a Government servant of an highly intelligent class, and his mental *capacity* would probably remain quite unaffected by his financial embarrassments." If, then, there was no mental incompetence on the part of the defendant, it follows that what the defendant did was done deliberately and voluntarily. What relation could in that case subsist between him and the plaintiff at the time of the contract to enable the latter to dominate the will of the former so as to obtain an unfair advantage over him, unless it be that of a man, heavily indebted indeed, but intelligent and suffering from no mental or physical disability, seeking a loan from a money-lender to relieve his pressing liabilities? When a man who is in urgent need of money on account of his poverty and pecuniary difficulties asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money-lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of clause 1 of section 16. If it were, every borrower able to judge for himself and take care of his interests, who has urgent need of money, might deliberately and voluntarily agree to any terms proposed by the lender and afterwards successfully repudiate the contract on the mere ground of folly, imprudence or want of foresight. The doctrine of undue influence was never meant to protect such persons. See *Allcard* v. *Skinner* [1].

It has been observed in some cases decided under the English Law, that the difficulty as to the law of undue influence consists not in any uncertainty of the law on the subject, but in its application to the circumstances of each case. But the terms of the law embodied in section 16 of the Contract Act are explicit and admit of no ambiguity. There should be no difficulty as to their application. The law contained in the section is, as has

[1] (1887) 36 Ch. D. 145, at pp. 182, 183.

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been pointed out in *Bhimbhat* v. *Yeshwantrao*[1], a substantial reproduction of the principles expounded by this Court in *Kedari* v. *Atmarambhat*[2]. There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like which plainly fall within clause 1 of the section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted are of great importance—*Rhodes* v. *Bate*[3]; *Baker* v. *Monk*[4]; *Clark* v. *Malpas*[5]. This rule of law cannot be better stated than in the words of Lord Kingsdown in *Smith* v. *Kay*[6]: "The principle" of undue influence, "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals, are those of trustee and *cestui que* trust, and such like. It applies specially to those cases, for this reason and this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases...the confidence and the influence must be proved extrinsically." In short, the test is, confidence reposed by one party and *betrayed* by the other, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves—per Lord Cranworth in *Boyse* v. *Rossborough*[7].

We cannot agree, therefore, with the District Judge's view of law that the facts found by him satisfy the first condition of undue influence laid down in clause 1 of section 16 of the Contract Act. Nor can we uphold his view of the law as applied to the facts with reference to the second condition. Those facts are that the defendant agreed by the *khata* (Exhibit

(1) (1900) 25 Bom. 126.
(2) (1866) 3 Bom. H. C. R. A. C. J. 11.
(3) (1866) L. R. 1 Ch. 252 at p. 257.
(4) (1864) 4 D. F. & S. 388.
(5) (1862) 4 D. F. & J. 401.
(6) (1859) 7 H. L. Cas. 750 at p. 779.
(7) (1857) 6 H. L. Cas. 2 at p. 45.

25 and Exhibit 27) to pay not only a time-barred debt, but also interest thereon and the costs of the suit in which it had been held that the plaintiff had lost his remedy to recover the debt under the Statute of *Limitations*. So far as the *khata* related to the amount of the time-barred debt, the District Judge allows that the plaintiff cannot be held to have obtained an *unfair* advantage over the defendant by reason of the latter's promise to pay that amount. He is of opinion, however, that the promise to pay interest and the costs of the suit, which amounted to Rs. 25, has "an element of unfairness," because neither was legally recoverable from the defendant. The term "unfair advantage" in clause 1 of section 16, is used as meaning an advantage obtained by *unrighteous* means. It is not found by the District Judge and neither the pleadings nor evidence suggest that any such means were used by the plaintiff. If, according to law, a promise to pay a debt barred under the Statute of Limitations is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor because the latter has been deprived of the use of his money and the debtor has had the benefit of it. As to the costs of the suit, the amount was only Rs. 25 and if the defendant, as an honest man, was morally, if not legally, bound to pay the debt, instead of compelling the plaintiff to sue him, those costs must be regarded as a part of the debt itself which it was competent for the defendant in all honesty to repay to the plaintiff. The transaction cannot be regarded as being in itself harsh and unconscionable. On the other hand, it is just what a right-minded person, with some sense of honour, would enter into, and no Court of Equity would set aside such a contract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of *fraud*, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an *unconscientious* use of power arising out of certain circumstances and conditions—*Smith*

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v. *Kay*[1], and showing that the defendant having been victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. The District Judge's finding as to the defendant's mental competence negatives any such inference as the latter.

For these reasons, we must vary the decree of the District Judge and award the claim as against defendant 1, who should pay to the plaintiff half the costs throughout. We cannot pass the usual order that costs shall follow the event, having regard to the fact commented upon by the District Judge that the plaintiff made a false case as to the consideration for the promissory note on which the suit was brought. Cross-objections stand dismissed.

Decree varied.

R. R.

(1) (1859) 7 H. L. Cas. 750 at p. 779.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1907. *October* 1.

DEU MARD DADA GAVLI (ORIGINAL DEFENDANT No. 3), APPLICANT, v. SITARAM CHIMNAJI (ORIGINAL PLAINTIFF), OPPONENT.*

Mámlatdárs' Courts Act (Bombay Act II of 1906), sec. 19, cl. (b)†—Possessory suit—Landlord and tenant—Trespasser dispossessing the tenant during the duration of tenancy—Landlord suing to recover possession within six months from the determination of the lease.

On the 5th June 1905, the plaintiff let certain lands to defendants Nos. 1 and 2. During the continuance of the tenancy defendant No. 3, a trespasser, dispossessed defendants Nos. 1 and 2 and got into possession of the lands in November 1905. The tenancy determined on the 6th June 1906. On the

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*Civil Application No. 168 of 1907.

†The Mámlatdárs' Courts Act (Bombay Act II of 1906), section 19, clause (b), runs as follows:—

19. (1) On the day fixed, or on any day to which the proceedings may have been adjourned, the Mámlatdár shall, subject to the provisions of section 16, proceed

29th October 1906, plaintiff filed a possessory suit in the Mámlatdár's Court against the defendants Nos. 1—3 to recover possession of the lands. The defendant No. 3 contended that her adverse possession having commenced more than six months before the institution of the suit, the Mámlatdár had no jurisdiction so far as the plaintiff's claim against her was concerned.

Held, that the plaintiff's remedy having been to bring his suit under clause (*b*) of section 19 of the Mámlatdárs' Courts Act (Bombay Act II of 1906), on the expiry of the tenancy, the fact that a trespasser got into possession during the continuance of the tenancy, but more than six months before its determination, did not oust the Mámlatdár's jurisdiction.

Per CHANDAVARKAR, *J.*—The Mámlatdárs' Courts Act (Bombay Act II of 1906) is a remedial measure and must be liberally construed so as to advance the remedy.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882), against the decision of L. B. Goge, Mámlatdár of Niphád.

Suit to recover possession of certain lands, under the provisions of the Mámlatdárs' Courts Act (Bombay Act II of 1906).

The plaintiff let the lands to Punja and Sakharam (defendants Nos. 1 and 2) on the 5th June 1905. During the continuance of the tenancy, Punja and Sakharam were dispossessed by Deu (defendant No. 3), who went into possession of the lands in November 1905. The tenancy terminated on the 6th June 1906.

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to hear all the evidence that is then and there before him, and to try the following issues, namely :—

* * * * * * *

(*b*) If the plaintiff avers that he is entitled to possession of any property or restoration of any use by reason of determination of any tenure or other right of the defendant in respect thereof :—

(1) Whether the defendant is in possession of the property or in the enjoyment of the use by a right derived from the plaintiff or from any person through whom he claims.

(2) Whether such right has determined at any time within six months before the suit was filed.

(3) Whether the defendant is other than a person who has been a former owner or part owner within a period of twelve years before the institution of the suit of the property or use claimed, and other than the legal representative of such former owner or part owner

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DEU DADA GAVLI v. SITARAM.

The plaintiff filed this suit against defendants Nos. 1—3 on the 29th October 1906.

Defendant No. 3 contended that her adverse possession having commenced in November 1905, that is, more than six months before the suit was brought, she was not amenable to the jurisdiction of the Mámlatdárs' Courts.

The Mámlatdár awarded the plaintiff's claim against all the defendants. His reasons were as follows:—

The chief contention of defendant No. 3 is that she dispossessed defendants Nos. 1 and 2 in November 1905, and her adverse possession against the plaintiff commenced from that time. The dispossession of defendants Nos. 1 and 2 took place during the currency of the lease. Plaintiff could not have proceeded in the matter until the expiration of the lease. This view is supported by I. L. R. 18 Bom. 216. It is clearly laid down in I. L. R. 20 Bom. 260, that the landlord cannot proceed against a trespasser for having ousted a tenant during the period of the tenure. The present case is on all fours with the above quoted case when the tenant (defendant No. 1) informed the plaintiff that he was dispossessed he replied that the defendants should institute a suit. In these circumstances the adverse possession of defendant No. 3 against the plaintiff commenced from the termination of the lease, *viz.*, from 6th May 1906"

The defendant No. 3 applied to the Collector of Násik, under section 23 of the Mámlatdárs' Courts Act, 1906, but he declined to revise the Mámlatdár's decision.

Defendant No. 3 then applied to the High Court.

R. R. Desai, for the applicant.

P. D. Bhide, for the opponent.

CHANDAVARKAR, J.:—The suit was brought in the Mámlatdár's Court under clause (*b*) of section 19 of the Mámlatdárs' Act. According to the finding of the Mámlatdár the tenancy of defendants 1 and 2, which had commenced on the 5th June 1905, expired on the 6th June 1906; and the suit having been filed within six months from the latter date, the Mámlatdár has jurisdiction to take cognizance of it, so far as the cause of action affecting defendants 1 and 2, the tenants of the plaintiff, was concerned. But it is contended before us, as it was before the Mámlatdár, that he had no jurisdiction to try the suit, so far as

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it affected defendant No. 3. Now, the Mámlatdár has found that defendant No. 3 has been in possession of the land since November 1905. That defendant having gone into possession during the continuance of defendants 1 and 2's tenancy, the plaintiff could not have sued in the Mámlatdár's Court to oust her: *Goma* v. *Narsingrao*[1]. Defendants 1 and 2 could have sued, but if they were unwilling, the plaintiff according to the decision just cited had no alternative but to wait until the tenancy expired. Under these circumstances the law must be construed so as to prejudice no party situated as the plaintiff in the present case is. The Mámlatdárs' Act is a remedial measure and must be liberally construed so as to advance the remedy. And we think in a case of this kind the plaintiff's remedy being to bring his suit under clause (*b*) of section 19 on the expiry of the tenancy, the fact that a trespasser (which defendant No. 3 must for the purposes of this case be held to be) got into possession during the continuance of the tenancy, but more than six months before its determination is not sufficient to oust the Mámlatdár's jurisdiction. The trespass was on the tenancy and must stand or fall with it, because the plaintiff could not have assailed it in the Mámlatdár's Court so long as the tenancy was in force and it must be held on a proper construction of the object and policy of the Mámlatdars' Act, that a trespasser like defendant No. 3 cannot defeat the right of the landlord to recover immediate possession of the land on the determination of defendants Nos. 1 and 2's tenancy by resorting to the summary remedy given by the Act. The rule is discharged with costs.

Rule discharged.

R. R.

(1) (1895) 20 Bom. 264.

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DEU DADA GAVLI v. SITARAM.

The plaintiff filed this suit against defendants Nos. 1—3 on the 29th October 1906.

Defendant No. 3 contended that her adverse possession having commenced in November 1905, that is, more than six months before the suit was brought, she was not amenable to the jurisdiction of the Mámlatdárs' Courts.

The Mámlatdár awarded the plaintiff's claim against all the defendants. His reasons were as follows:—

The chief contention of defendant No. 3 is that she dispossessed defendants Nos. 1 and 2 in November 1905, and her adverse possession against the plaintiff commenced from that time. The dispossession of defendants Nos. 1 and 2 took place during the currency of the lease. Plaintiff could not have proceeded in the matter until the expiration of the lease. This view is supported by I. L. R. 18 Bom. 216. It is clearly laid down in I. L. R. 20 Bom. 260, that the landlord cannot proceed against a trespasser for having ousted a tenant during the period of the tenure. The present case is on all fours with the above quoted case when the tenant (defendant No. 1) informed the plaintiff that he was dispossessed he replied that the defendants should institute a suit. In these circumstances the adverse possession of defendant No. 3 against the plaintiff commenced from the termination of the lease, *viz*, from 6th May 1906."

The defendant No. 3 applied to the Collector of Násik, under section 23 of the Mámlatdárs' Courts Act, 1906, but he declined to revise the Mámlatdár's decision.

Defendant No. 3 then applied to the High Court.

R. R. Desai, for the applicant.

P. D. Bhide, for the opponent.

CHANDAVARKAR, J.:—The suit was brought in the Mámlatdár's Court under clause (*b*) of section 19 of the Mámlatdárs' Act. According to the finding of the Mámlatdár the tenancy of defendants 1 and 2, which had commenced on the 5th June 1905, expired on the 6th June 1906; and the suit having been filed within six months from the latter date, the Mámlatdár has jurisdiction to take cognizance of it, so far as the cause of action affecting defendants 1 and 2, the tenants of the plaintiff, was concerned. But it is contended before us, as it was before the Mámlatdár, that he had no jurisdiction to try the suit, so far as

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DEU DADA GAYLI v. SITARAM.

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Rule discharged.

R. R.

(1) (1895) 20 Bom. 264.

List of the Books and Publications for sale which are more than two years old.

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VOL. XXXII.] [PART II.



THE INDIAN LAW REPORTS.

1908.

FEBRUARY 1.

(Pages 49 to 107.)

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PRINTED AND PUBLISHED AT THE GOVERNMENT CENTRAL PRESS

UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

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APPELLATE CIVIL.

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DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 15B.—*Decree on mortgage—Direction to pay interest—Application to cancel direction.*] A decree on a mortgage was passed by the First Class Subordinate Judge of

it affected defendant No. 3. Now, the Mámlatdár has found that defendant No. 3 has been in possession of the land since November 1905. That defendant having gone into possession during the continuance of defendants 1 and 2's tenancy, the plaintiff could not have sued in the Mámlatdár's Court to oust her: *Goma* v. *Narsingrao*[1]. Defendants 1 and 2 could have sued, but if they were unwilling, the plaintiff according to the decision just cited had no alternative but to wait until the tenancy expired. Under these circumstances the law must be construed so as to prejudice no party situated as the plaintiff in the present case is. The Mámlatdárs' Act is a remedial measure and must be liberally construed so as to advance the remedy. And we think in a case of this kind the plaintiff's remedy being to bring his suit under clause (*b*) of section 19 on the expiry of the tenancy, the fact that a trespasser (which defendant No. 3 must for the purposes of this case be held to be) got into possession during the continuance of the tenancy, but more than six months before its determination is not sufficient to oust the Mámlatdár's jurisdiction. The trespass was on the tenancy and must stand or fall with it, because the plaintiff could not have assailed it in the Mámlatdár's Court so long as the tenancy was in force and it must be held on a proper construction of the object and policy of the Mámlatdars' Act, that a trespasser like defendant No. 3 cannot defeat the right of the landlord to recover immediate possession of the land on the determination of defendants Nos. 1 and 2's tenancy by resorting to the summary remedy given by the Act. The rule is discharged with costs.

Rule discharged.

R. R.

(1) 1895) 20 Bom. 206.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. July 25.

RE GULBAI AND LILBAI, MINORS. DHAKLIBAI, WIDOW, PETITIONER.

Guardians and Wards Act (VIII of 1890), section 17—Appointment of Guardian of person of Minors—Hindu Law.

According to Hindu Law in the case of minors who have lost both parents the nearest male kinsman should be appointed their guardian, the paternal kinsmen having the preference over the maternal.

The interest, well being, and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor.

THIS was an application for the appointment of a guardian of the person and property of minors under the Guardians and Wards Act.

The facts relating to the petition appear sufficiently from the judgment.

Raikes (Acting Advocate General), for the applicant.

Jinnah, for the opponents.

DAVAR, J.—The petitioner Dhaklibai, the maternal grandmother of two orphan girls named Gulbai and Lilbai of the respective ages of 12 and 8, prays that she or some other fit and proper person may be appointed guardian of the person and property of the minors. The minors' mother, Muktabai, daughter of the petitioner, died six years ago. Their father Ganpatrao died in the year 1905. During his life time Ganpatrao lived with his wife and children in the house of his father Nanabhai Raghunath. Nanabhai's daughter Shantibai became a widow five years ago and came and lived with her father from the time she became a widow. The minors have an elder sister named Zalbai. She is now married but till she was married she lived with her sisters in her grandfather Nanabhai's house. Nanabhai got her married at an expense of about Rs. 2,000. Nanabhai died on the 14th of May 1907. Till the 14th of June 1907 the minors were living with their paternal aunt Shantibai. On that day

the elder minor Gulbai was taken away from Shantibai's custody by the petitioner. The reason given for such forcible removal was that Gulbai was going to be clandestinely married to a man named Keshrinath, who, the petitioner says, was "a person given to vices." Shantibai applied to the High Court for a Rule in the nature of a Habeas Corpus and after a very full hearing Mr. Justice Macleod ordered that Gulbai should be restored to the custody of her paternal aunt Shantibai. I understand from counsel who argued this petition that the learned Judge left the question as to who was entitled to the custody of the minors open to be decided on this petition. The minors have hitherto never lived with the petitioner The petitioner's son Jaywant, the maternal uncle of the minors, is an Assistant Accountant General at Lahore at present. This petition was presented while the Habeas Corpus proceedings were pending. So far there is no contest between the petitioner and the opponents Shantibai and the minors' father Ganpatrao's paternal uncle Vinayak who oppose the petition and ask that they should be appointed guardians of the minors' persons. The property of the minors appears to be very small and before me both parties were quite indifferent as to who was appointed a guardian of the property and it was suggested that an officer of the Court may be appointed such guardian. The struggle before me was as to the custody of the persons of the minors. The Advocate General contended that his client the petitioner was a woman of means—that her son occupied a good position in life and that the minors would be better cared for and be much happier with his client than with Shantibai and Vinayak—the first of whom he said was without any means and the second had been insolvent. Another objection which the Advocate General urged was that Shantibai had a daughter of her own about the same age as Gulbai and that that was an element which would lead to discord. He urged that the minors would have the undivided affection of their grandmother who had no children in the house to compete with the minors in the affection of the petitioner. The learned counsel offered to maintain the minors and get them married at his client's own costs. On the other side it was urged that the petition was only a counter-blast to the

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Re Julbai and Lilbai.

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When listening to these warm and fervid protestations of affection for the minors and the intense anxiety displayed by both parties for their welfare I thought it was a good opportunity to secure some benefit for them before the warmth of the parties cooled down and I asked both counsel if their clients pledged themselves to the condition that whoever was appointed guardian of the persons of the minors would bring into Court and pay to the guardian of the property of the minors whom I may appoint Rs. 4,000 for the marriages of the two girls. I suggested four thousand as I find that their sister Zalbai was got married by her grandfather Nanabhai at the costs of a little over Rs. 2,000.

Both sides have through their counsel pledged themselves to pay to the guardian of the minors' property Rs. 4,000 to defray their marriage expenses on being appointed guardian or guardians of the persons of the minors and have agreed that the appointment should be conditional on the payment of this sum. This at all events is a most satisfactory result of the petition.

I have now therefore to consider whom I should appoint as the guardian or guardians of the persons and property of the minors. As there is a dispute between the parties as to what exactly is the property of the minors I think it is desirable to appoint an officer of the Court to receive and recover the property of the minors and deal with it in the manner I will direct hereafter.

The question as to who amongst the contending parties should be appointed guardian of the persons of the minors presents no difficulty whatever to my mind. After I had the affidavit read before me on Saturday last the 20th instant and heard counsel's argument I directed that both the minors should be

brought before me on Tuesday morning and they were on that day both examined by me and their statements in answer to my questions are taken down in short hand, the transcript of which will remain with these proceedings.

In appointing a guardian I am, under the provisions of section 17 of the Guardians and Wards Act of 1890, to take into consideration various things. First of all I must consider who in law is entitled to be appointed a guardian. The minors are Hindus and according to Hindu Law in the case of minors who have lost both parents "the nearest male kinsmen should be appointed, the paternal kinsmen having the preference over the maternal". See Mayne's Hindu Law, 7th Edition, page 273, section 271. The petitioner is a maternal grandmother and her son is a maternal uncle. The opponents are a paternal aunt and a paternal great-uncle, *i. e.* the minors' father's paternal uncle, their grandfather's brother. Strictly speaking then if I was merely to be guided by consideration as to who is in law entitled to be appointed guardian I should have to say the right belongs to the paternal great-uncle Vinayak Raghunath.

Under the section I have also to take into consideration "any existing or previous relations of the proposed guardian with the minor or his property." Now so far as Dhaklibai and Jaywant are concerned there have been no previous relations at all and there are no existing relations with the minors. The girls never knew their grandmother or maternal uncle—they have never lived with them and during the enforced residence of Gulbai at her grandmother's house the impression produced on her mind is most unfavourable. Dhaklibai did not succeed in inspiring any feelings of affection or reverence towards her in the mind of Gulbai. On the other hand the previous and existing relations of Shantibai and Vinayak with the minors are of the most affectionate kind. Not only did the elder minor speak of her paternal aunt Shantibai and her great-uncle Vinayak with affection but even the child Lilbai showed unmistakable signs of attachment to Shantibai. This again points most clearly to the Court who should be the guardian of the girls.

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Re Gulbai and Lilbai.

Next I have to take into consideration the preference of the minors if they are old enough to form an intelligent preference. The little girl Lilbai told me in very clear terms that she was very happy with Aku and Tatya meaning Shantibai and Vinayak. She had never seen her maternal grandmother and uncle and evidently was not ever aware of their existence. The elder minor, who appears to be older than she is said to be, impressed me as a very intelligent girl and very sensible for her age. As I said before she spoke affectionately and reverently of Aku and Tatya and resented very angrily my suggestion that she should go and live with her grandmother. She very firmly told me that she would not go and live with her and seemed surprised that I should suggest such a thing. This consideration again works in favour of the opponents.

But the mere legal right to be appointed a guardian, the preference of the minors, and the existing or previous relations are very minor considerations as compared with the main question—what order would be for the welfare of the minor? In making orders appointing guardians for the persons of minors the most paramount consideration for the Judge ought to be—what order under the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardian is—who amongst the relations or for the matter of that, friends of the minors can you select who will supply as nearly as possible the place of their lost parent or parents? The interest, well being and happiness of the minors ought as I said before to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. This is the view taken by the Allahabad High Court in *Bindo* v. *Sham Lal*[1] wherein a Division Bench of the High Court reversing the order of the lower Court appointed the

(1) (1906) 29 All. 210.

maternal grandmother of the minor—guardian of the minor's person in preference to the minor's own natural father. There was nothing against the father. The only thing urged was that he had married a second wife. The High Court felt that the child during its minority would be happier with the maternal grandmother and gave her the custody of the child in preference to the child's own father. This case is very instructive as showing that all other considerations gave way to the main and paramount consideration—the interest and welfare of the minor.

Let us now turn to the facts of the case and see where lies the happiness of these children. I find on the evidence before me that Dhaklibai has been estranged from the children of her daughter ever since her death. She says the estrangement was due to her refusal to give her other daughter in marriage to Ganpatrao. This is stoutly denied on the other side. It is not necessary for me to ascertain what was the cause of the estrangement. It is sufficient for the present purposes to find as a matter of fact that Dhaklibai is a stranger to her grandchildren. They have no affection for her. The enforced taking away of the elder girl and her detention in her house has created feelings of resentment in the mind of the elder girl. That the estrangement was more than merely accidental and that there must have been serious differences between Dhaklibai and the family of the minor's father appears to be very clear from the fact that for six years the children have never visited their grandmother. Dhaklibai and the members of her family did not attend Zalbai's wedding. She says they were not invited. The other side contradict this. Be that as it may she did not go and see the minors nor pay to her son-in-law's family a single condolence visit when Ganpatrao, the father of the children, died. Did that require invitation? Zalbai gave birth to a child after her marriage. Dhaklibai never went and saw her and it is said never made any inquiries after her health. Now did that again require an invitation? The conviction forced upon my mind is that Dhaklibai has been on most unfriendly terms with the family of her deceased son-in-law. I am far from saying that this is due to any fault on her part. I merely find this as a matter of fact and it is unnecessary to go

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Re Gulbai and Lilbai.

further and find out the cause of this unfriendliness. It is more than likely that Dhaklibai bears feelings of affection towards her dead daughter's children and it is more than probable that in taking Gulbai away and detaining her she was actuated by an honest desire to save the girl from what she considered or was led to believe was a step which would make her grandchild unhappy for life. I do not think she has presented this petition from improper motives either. She has shown a genuine desire to do all that is in her power for the welfare of her minor children. Her action in taking away Gulbai and detaining her was in the highest degree hasty and injudicious. It may be her misfortune that she should be estranged from her grandchildren, but the fact remains that they bear her no love or affection and they would be most unhappy if they were forced to go and live with her

The appointment of Jaywant is quite out of the question and it is not worth while discussing the desirability of his appointment. It was suggested that he may be appointed jointly with his mother Dhaklibai If I was inclined to appoint Dhaklibai I might have considered the suggestion though I hardly think his offer to join Dhaklibai as guardian would in any way have strengthened her claims. He is at Lahore now He is liable to be transferred from one place to another and situated as he is he would be of no use to the minors.

Let me now turn from Dhaklibai and Jayvant and consider the claims of Shantibai and Vinayakrao. They are paternal relatives and if I was merely deciding the question before me according to the strict legal rights of the parties I should have to give preference to Vinayakrao, at all events as against Dhaklibai. She is the maternal grandmother. He is the paternal grandfather's brother. The letters annexed to his affidavit prove conclusively that he was on intimate and affectionate terms with his brother—the grandfather of the minors. He appears to have always taken interest in the minors and although he was not living with his brother and the minors he often saw him and them. His insolvency seven or eight years ago may have been due to misfortunes. His present pecuniary position is one of ease. He is earning Rs. 120 a month

and has nobody to maintain therefrom except himself and his wife. Out of his earnings he can easily maintain the minors in comfort. In addition to his earnings Shantibai has a small competence of her own. They offer to provide for the marriage expenses of both the girls and it must be remembered that the elder girl will, in the ordinary course, soon be married. The children are attached to Shantibai. They have lived with her for five years and they say they have been quite happy. The presence of Shantibai's daughter far from being a drawback is to my mind an additional reason for keeping the minors where they are. They have the society of some one of the same age as the elder minor. The minor's sister strongly urges that they should be allowed to remain with Shantibai and her wishes carry weight with me.

Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. I have devoted my most anxious consideration to the question now before me and have come to a very definite and unhesitating conclusion that the interests and welfare of the minors will be best secured by my appointing Shantibai and Vinayakrao Raghunath joint guardians of the persons of the minor Gulbai and Lilbai, and accordinly I appoint them such guardians. This appointment is conditional on their paying to the guardian of the property of the minors, whom I am presently going to appoint, Rs. 4,000 for the marriage expenses of the two minor girls within one month from this day. Should either or both the minors die before her or their marriage this sum or a moiety thereof as the case may be is to be returned to the guardians of the persons now appointed by me. I direct Shantibai and Vinayak to allow Dhaklibai and Jaywant to have access to the minors at all reasonable times and to send the minors to Dhaklibai if she invites them on holidays or ceremonial occasions or at reasonable intervals if she desires to have the minors at her house.

I must here express my regret that the proposed marriage of Gulbai to Keshrinath has fallen through. I am by no

means satisfied that the proposed bridegroom was undesirable. Dhaklibai's allegation against him is extremely vague and I could hardly believe that the allegation is made from personal knowledge. I wholly distrust the statements made by Lotleker in his affidavit. I do not believe that Shantibai and Vinayakrao would have knowingly agreed to give Gulbai in marriage to a bad man. I do not believe that the marriage was intended to be clandestinely performed. If that was so, Dhaklibai would not have come to know of it six days before the date of the intended marriage. I am far from committing myself to saying that the proposed bridegroom was a desirable match. All I say is that on the materials now before me I am not at all satisfied that he was not an eligible and proper person to be married to Gulbai. When I questioned Gulbai she said she had been consulted about the marriage and she was willing to marry him. She is a very intelligent girl and she told me that she is still willing to marry him. It seems to me to be a great pity that an attack should have been made on the man in such a manner that it has made him withdraw from the contemplated alliance. To avoid any possible mischief in the future I direct that Shantibai and Vinayakrao are not to give the minors in marriage without first obtaining the sanction of the sitting Judge in chambers and I further direct that notice of any such application for sanction to their marriage should be given to Dhaklibai and Jaywant. If Keshrinath should change his mind and still desire to marry Gulbai I will be prepared to consider the matter in chambers.

I appoint Mr. R. D. Sethna guardian of the property of the minors. Having regard to the smallness of the property and to the fact that he will not have very much to do, he has been good enough to agree to act without remuneration. He will receive Rs. 4,000 mentioned above, and recover the property of the minors, convert the same into cash, and hand the cash over to the Accountant General. The Accountant General is to open an account in the joint name of the minors, invest the amount that may be handed over to him in Government paper, and pay interest on Government paper of the nominal value of Rs. 4,000 to Shantibai to be expended by her towards

the maintenance of the minors. The Accountant General will hold the said funds so invested till the further order of this Court.

Under all the circumstances of the case and having regard to my findings I must order Dhaklibai, the petitioner, to pay the costs of Shantibai and Vinayak. I certify for counsel.

Attorneys for the petitioner: Messrs *Chitnis and Motilal.*

Attorneys for the opponent: Messrs. *Khanderao, Laud and Mehta* and Messrs. *Chitnis and Motilal.*

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Russell, Chief Justice (acting), and Mr. Justice Heaton.

PANDHARINATH VISHVANATH (ORIGINAL DEFENDANT 1), APPELLANT, *v.* GOVIND SHIVRAM (ORIGINAL PLAINTIFF), RESPONDENT.*

1907. *August* 27.

Hindu Law—Mitakshara—Widow—Moveables inherited from husband—Gift invalid.

A Hindu widow is not competent under the Mitakshara to make a gift of moveables inherited by her from her husband who died childless and intestate.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Sholápur, confirming the decree of G. R. Gokhale, Joint Subordinate Judge of Sholápur.

One Shivram left him surviving three sons, namely, Govind, Manohar and Gopal, who were undivided in interest. They got their shares divided by an award of arbitrators, and on the 25th September 1897 a decree was passed in the terms of the award. Gopal, being of unsound mind, was represented by his eldest brother Govind in the arbitration proceedings. Under the decree, Gopal was given a specific share of the family property, some ornaments for his wife Gitabai and Rs 4,350 in cash. Gopal's share was made over to his wife on the 1st December 1898. Gopal died in September 1902 and on the 22nd December

* Second Appeal No. 297 of 1906.

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following his widow Gitabai made a deed of gift in favour of one Pandharinath Vishvanath Kumthekar (defendant 4), Gopal's sister's son. The deed of gift recited the near relationship of the donee, that he was the family priest and that he had incurred expenses for the maintenance of the donor and her deceased husband and for the performance of religious rites, and declared certain debts due by him to the deceased amounting to Rs. 1,000 were remitted according to the dying wishes of the deceased. On the same day Gitabai made a will in favour of the said Pandharinath (defendant 4) and one Pandurang Narayan (defendant 3), a minor grandson of Manohar Shivram. Under the will she devised the immoveable property inherited by her from her husband in favour of the minor Pandurang absolutely, and bequeathed the moveables in equal half shares to the said minor Pandurang and the said Pandharinath.

Gitabai died in February 1904. Govind Shivram thereupon brought the present suit as reversionary heir to recover possession of Gopal's estate. Govind's brother, Manohar Shivram, being unwilling to join in the suit as a plaintiff, was made defendant 1, and as he died after the institution of the suit, his son Narayan was joined as defendant 2. Narayan also having died pending suit, his son, the said minor Pandurang, was brought on the record as defendant 3. Pandharinath Vishvanath, the donee under Gitabai's deed of gift and one of the devisees under her will, was joined as defendant 4. Defendants 5 and 6 were added because they were in possession of some of the properties in suit.

Defendant 3 set up his title as devisee under Gitabai's will.

Defendant 4 answered that he was entitled to the property given in gift and devised by Gitabai under her deed of gift and will.

The Subordinate Judge found that Gitabai had no right to execute the deed of gift and the will, and he allowed the plaintiff's claim.

On appeal by defendant 4 the District Judge confirmed the decree. His reasons were as follows :—

Exhibit 65 then is a deed of gift pure and simple and the crucial point in this case as to the validity of that gift raises the still unsettled question of Hindu Law as to the competency of a widow in Western India governed by the

law of the Mitakshara to dispose by way of gift of moveables inherited from her husband. As remarked by Mr. Mayne at page 845 of his Treatise on Hindu Law, 6th edition, the point is one on which there is a conflict of judicial opinion. The authorities have been reviewed at length by Jardine, J., in the case of *Gadadhar Bhat* v. *Chandrabhagabai*, I. L. R. 17 Bom. 690, in his order referring to the Full Bench the question whether under the law of the Mitakshara a widow has power to bequeath by her will moveable property inherited by her from her husband. The Full Bench accepting as applicable throughout the whole Presidency the ruling of the Privy Council in the case of *Bhugwandeen* v. *Myna Baee*, 11 Moo. I. A. 510—514, that the property inherited by a widow from her husband devolves on his heirs at her death, decided that a widow had no such power, and to that extent overruled the decision in *Damodar* v. *Purmanandas*, I. L. R. 7 Bom 155.

It must be noted that Jardine, J., in his referring judgment had felt himself so far bound by the current of the earlier Bombay decisions notwithstanding their conflict with the above Privy Council ruling as to concede that with reference to cases arising from Bombay and those districts where the Mayukha was supreme a widow may have the power to bequeath by will moveables inherited from her husband though he declined to follow those decisions as regards districts where the Mitakshara is the primary authority. But in the later case of *Shah Chamanlal Maganlal* v. *Doshi Ganesh Motichand*, I. L. R. 28 Bom 453, a Divisional Bench held that the earlier Bombay rulings in face of the above Privy Council decision could not have the authority claimed for them even with regard to the former class of cases.

The Full Bench ruling in I. L. R. 17 Bom. 690 left untouched the question of the widow's power of alienation during her life. The Privy Council while deciding that under the law of the Mitakshara as administered in Benares the widow had no larger power of disposition over moveables than over immoveable property, intimated that in this respect there might be a difference between the Benares School and the law administered in Western and Southern India (11 Moo. I. A. 510—514). This possible exception was suggested in view of the current of contrary decisions of the Bombay and Madras High Courts. The Madras High Court has subsequently assimilated the law of Southern India with the law of the Benares School in this respect, apparently overruling the previous decisions to the contrary (I. L. R. 8 Mad. 290 and 305). The Bombay decisions (1 Bom. H. C. R. 56, 8 Bom. H. C. R. 244, 7 Bom. 155, 11 Bom. 299, 16 Bom. 229, 233) have all been elaborately reviewed by Jardine, J., in *Gadadhar's* case. I have shown now the authority of those decisions has been gradually undermined. Those decisions perhaps establish that with regard to cases arising under the Mayukha or in Bombay a widow has an absolute power of disposition *inter vivos* over inherited moveables. They furnish no authority with regard to cases governed like the present by the Mitakshara law, and with reference to these the conclusion suggested by Jardine, J., is that the widow must preserve the capital unless the expenditure of it is

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necessitated by the insufficiency of the income to provide for her maintenance, subject, nevertheless, to a power to dispose of a moderate portion for works of piety, her power of disposition over moveables being thus placed on a par with her power over immoveables.

If this view of the law is correct, it is clear that the deed of gift (Exhibit 65) could pass no interest to defendant 4.

Defendant 4 preferred a second appeal.

J. R. Gharpure appeared for the appellant (defendant 4):—The question is whether Gitabai, who was a Hindu widow in possession of her husband's property, was entitled to make a gift of his moveables. We contend that she had full power to do so and our contention is fortified by a uniform series of decisions which are all one way: *Goolab* v. *Phool*[1], *Bechur* v. *Baee Lukmee*[2], *Vinayek Anundrao* v. *Luxumeebaee*[3], *Narsappa* v. *Sakharam*[4], *Tuljaram Morarji* v. *Mathuradas*[5], *Balvantrav* v. *Purshotam*[6], *Narayan Babaji* v. *Nana Manohar*[7], *Harilal Harjivandas* v. *Pranvalavdas*[8], *Gandhi Maganlal* v. *Bai Jadab*[9], *Gadadhar Bhat* v. *Chandrabhagabai*[10]. See also Strange's Hindu Law, Vol. I, p. 246.

[HEATON, J.:—Is not the proposition laid down in these cases shaken by *Chamanlal* v. *Ganesh Motichand*[11]?]

We submit not. That ruling and *Gadadhar Bhat* v. *Chandrabhagabai*[12] leave the question of giving away unaffected.

The decision in *Bhugwandeen Doobey* v. *Myna Baee*[13] relied on by the lower Courts makes an express reservation so far as this Presidency is concerned. See also *Mussumat Thakoor Deykee* v. *Rai Baluk Ram*[14].

The position of females in Western India is far different from that in other parts and a long course of decisions has deliberately given them a latitude in pursuance of the past traditions which it is no longer open to the Court to set aside.

(1) (1816) 1 Borr. 173.
(2) (1863) 1 Bom. H. C. R. 56.
(3) (1861) 1 Bom. H. C. R. 117.
(4) (1869) 6 Bom. H. C. R. A. C. J. 215.
(5) (1881) 5 Bom. 662.
(6) (1872) 9 Bom. H. C. R. 99.
(7) (1870) 7 Bom. H. C. R. A. C. J. 153.
(8) (1888) 16 Bom. 229.
(9) (1899) 24 Bom. 192.
(10) (1892) 17 Bom. 690.
(11) (1904) 28 Bom. 453.
(12) (1892) 17 Bom. 690.
(13) (1867) 11 M. I. A. 487 at p. 504.
(14) (1866) 11 M. I. A. 139.

[RUSSELL, Ag. C. J.:—Are there any texts in support of this *proposition?*]

There are texts. The Mitakshara, II, verse 143, Sanskrit; *Stoke's Hindu Law Books*, p. 348; *Mandlik's Hindu Law*, p. 77, lines 11—20; the Virmitrodaya, Sanskrit, Chap III, p. 56, paras. 1 and 2; Katyayana *cited and discussed in Vivadachintamani in* Tagore's translation, p. 261, Sanskrit passages at p. 218 of the Bombay edition.

G. S. Rao appeared for the respondent (plaintiff):—The texts which relate to the widow's estate in property inherited from her husband, are chiefly those of Katyayana and Narada. The text from Mahábharat is also to the same effect: Colebrooke's Digest, verses 477, 402; Mayne's Hindu Law, section 607. These texts clearly show that a childless widow is to *enjoy* the estate frugally for her life but not to *waste* it or dispose of it in any way she pleases. Katyayana's text makes a distinction between property *given* to a wife by her husband and property *inherited* by a widow from her husband. In the former case she may dispose of it at pleasure after her husband's death if it be moveable, but in the latter case no distinction is made between moveables and immoveables. She takes a qualified and restricted estate in both kinds of property. There is nothing in the texts or the commentaries which confers on the widow larger powers of disposal over moveables than immoveables. Under the Mitakshara property inherited from her husband would, no doubt, be treated as her *Stridhan*. But it does not follow from this that she acquires an absolute power of disposal over such property. An absolute power of disposal is not under the Mitakshara an essential incident of ownership. According to Chapter I, section 1, pl. 2 of the Mitakshara even the father, who is the head of the family, is subject to the control of his sons with respect to immoveable property whether ancestral or self-acquired, and though he has larger powers of disposal over the moveables, he cannot make an unequal division of the moveables between his sons: *Lakshman Dada Naik* v. *Ramchandra Dada Naik*[1]. So too under pl. 29 no other coparcener can alienate family property

(1) (1880) L. R. 7 I. A. 181.

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necessitated by the insufficiency of the income to provide for her maintenance, subject, nevertheless, to a power to dispose of a moderate portion for works of piety, her power of disposition over moveables being thus placed on a par with her power over immoveables.

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[HEATON, J.:—Is not the proposition laid down in these cases shaken by *Chamanlal* v. *Ganesh Motichand*[11]?]

We submit not. That ruling and *Gadadhar Bhat* v. *Chandra-* ... leave the question of giving away unaffected. As to the other cases cited they ... *Myna Baee*[13] relied on and only one of them has a direct bearing on ... so far as this v. *Baee Lukmee*[4], whilst in *Pranjeevandas* v. *Dewcoo*... ...*ikee* v. *Naralram* v. *Nandkishor*[6], *Vinayek Anundrao* v. *Luxumeeba*..., and *Tuljaram Morarji* v. *Mathuradas*[8], the observations of the Court are *obiter dicta*. The authority of these cases appears to be shaken by the later decisions of this Court in *Gadadhar Bhat* v. *Chandrabhagabai*[9] and *Chamanlal* v. *Ganesh Motichand*[10]. On the other hand so far as the Mitakshara is concerned, the

(1) (1871) 8 Bom. H. C. R. O. C. J. 241 at p. 265.
(2) (1856) 11 Bom. 309.
(3) (1860) 6 Bom. H. C. R. A. C. J. 215.
(4) (1863) 1 Bom. H. C. R. 56.
(5) (1859) 1 Bom. H. C. R. 130.
(6) (1865) 1 Bom. H. C. R. 209.
(7) (1861) 1 Bom. H. C. R. 117.
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question is authoritatively decided by the Privy Council in *Bhugarandeen* v. *Myna Baee's* case[1]. The restrictions on widow's power of alienation are inseparable from her estate: *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[2], and the reasons are obvious. Her position is one of dependence. She is enjoined to lead an ascetic life for the benefit of her husband's soul and the property which she inherits—at best the corpus—is to be preserved for the benefit of her husband's heirs.

If the moveables were her absolute property, they would pass on her death to her heirs, but they do not *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*[3], *Harilal Harjivandas* v. *Pranvalabdas*[4]. Secondly, if they were her absolute property, they would be liable to satisfy her debts in the hands of the reversionary heirs, but that is not the case. *Bai Jamna* v. *Bhaishankar*[5]. Thirdly, if they were at her absolute disposal, she would be competent to will them away. But it is now settled law that she has no such power under the Mitakshara or under the Mayukha: *Gadadhar Bhat* v. *Chandrabhagabai*[6] and *Chamanlal* v. *Ganesh Motichand*[7].

If she cannot make a will, she cannot also make a gift *inter vivos* of such property. Bequests stand substantially on the same footing as gifts. Wills may generally be regarded as gifts *in futuro* to take effect upon death. The law of wills is a development of the law of gifts. *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*[8], *Bai Motivahoo* v. *Mamoobai*[9]. The testamentary power of a Hindu being co-extensive with his power of making gifts, it follows that a widow is as incompetent to make a gift as she is to make a will of moveable property inherited from her husband.

Gharpure in reply:—Under the Mitakshara there is no analogy between a father as manager and a widow. The former is a trustee for the other members: *Annamalai Chetty* v. *Murugasa Chetty*[10], Mayne's Hindu Law, pp. 372, 435, 488. A widow is

(1) (1867) 11 M. I. A. 487.
(2) (1861) 8 M. I. A. 529 at p. 551.
(3) (1866) 11 M. I. A 139.
(4) (1888) 16 Bom. 229.
(5) (1891) 16 Bom. 233.
(6) (1892) 17 Bom. 690.
(7) (1904) 28 Bom. 453.
(8) (1872) 9 Ben. L. R. 377.
(9) (1897) L. R. 24 I. A. 93.
(10) (1903) 26 Mad. 544.

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except for a legal necessity. As Mayne remarks: "restriction is the rule, absolute power the exception." There is, therefore, no ground for contending that the Mitakshara allows to the widow an uncontrolled power of disposal over moveables inherited from her husband merely because such property is *stridhan*: *Vijiarangam* v. *Lakshuman*[1], *Bhagirthibai* v. *Kahnujirav*[2].

Turning to the Mayukha, Chapter IV, section 8, pl. 4, it will be seen that in discussing the widow's right of inheritance Nilakanth refers to Katyayana's text and lays down that a widow may give money or other moveable property for religious and other meritorious objects but not *Bandis*, *Charans* or swindlers. This shows that she is not to waste or fritter away her husband's wealth in any way she likes. Moreover Nilakanth applies Katyayana's text both to moveable and immoveable property, so that the restrictions apply to both kinds of property. One fails to find a single passage in the Mayukha which confers on the widow an absolute power of disposal over moveables inherited from her husband.

The present case is governed by the Mitakshara. Out of the numerous cases cited, only one was decided under the Mitakshara, namely, *Narsappa* v. *Sakharam*[3]. But that case relates to the mother's estate and her alienation of immoveable property inherited from her son. It does not touch the present question. [illegible] are decided under the Mayukha, and only one of them has a direct [illegible] this case: *Bechur* v. *Baee Lukmee*[4], whilst in *Prunjeevandas* v. *Dewcoo*[illegible]*verbaee*[5], *Naralram* v. *Nandkishor*[6], *Vinayek Anundrao* v. *Luxumeeba*[illegible]*ee*[7] and *Tuljaram Morarji* v. *Mathuradas*[8], the observations of the Court are *obiter dicta*. The authority of these cases appears to be shaken by the later decisions of this Court in *Gadadhar Bhat* v. *Chandrabhagabai*[9] and *Chamanlal* v. *Ganesh Motichand*[10]. On the other hand so far as the Mitakshara is concerned, the

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(6) (1865) 1 Bom. H. C. R. 209.

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under no such obligation, Mayne's Hindu Law, pp. 818, 810, 841. Her power is absolute within the limits prescribed by law. As regards the theory that she should lead the life of an ascetic, it is a general rule and does not affect questions arising in a Court of law: *Sreemutty Puddo Monee Dossee* v. *Dwarka Nath Biswas*[1], *Baisni* v. *Rup Singh*[2].

The Hindu theory is that the wife is the half of her husband's person and represents him fully after his death, Virmitrodaya, p. 141, sec 4, West and Buhler, pp. 90, 91 (note), pp 95, 312, 313, 314, 777, and 1158. It was urged that the cases we relied on were cases under the Mayukha excepting one and the present case being under the Mitakshara, they have no binding force. But a reference to any of those cases will show that all the texts have been referred to and considered and the law laid down therein is applicable to this Presidency. With respect to the relative position of the Mayukha and the Mitakshara see *Krishnaji* v. *Pandurang*[3], *Bhagirathibai* v. *Kahnujirav*[4]. Both under the Mitakshara and the Mayukha a widow cannot will away, still under the Mayukha she can give. It would be strange to contend that under the Mitakshara, which gives a very wide range to the word *stridhan*, a widow has no power to give away moveables.

With respect to the argument that the power of giving away *inter vivos* and that of willing away are co-extensive, see *Tara Chand* v. *Reeb Ram*[5], *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*[6].

RUSSELL, Acting C. J.—The question in this case is whether a deceased Hindu widow, governed by the Mitakshara, is competent to make a gift of moveables inherited by her from her husband, who died childless and intestate.

The appeal comes up from Sholapur.

The facts are simple. There were three brothers, the plaintiff Govind Shivram, defendant 1 Manohar, and one Gopal, husband of Gitabai. On the 25th September 1897 a decree for partition

(1) (1876) 25 W. R. 335 (Civ. Rul.).
(2) (1890) 12 All. 558.
(3) (1875) 12 Bom. H. C. R. 65.
(4) (1886) 11 Bom. 285.
(5) (1866) 3 Mad. H. C. R. 50.
(6) (1856) 6 M. I. A. 309 at p. 315 (para. 3).

between them was passed on an award (Exhibit 70); Gopal being of unsound mind was represented by the plaintiff in the arbitration proceedings. Under that decree Gopal was given a specific share in the family property consisting of a house, some ornaments for his wife and about Rs. 4,000 in cash; and on the 1st of December 1898 his share was handed over to his wife Gitabai, see Exhibit 71 Gopal died in September 1902 and on the 22nd of December 1902 Gitabai, his widow, executed a document, Exhibit 65, in favour of the defendant 4, a nephew of Gopal's. That document recites that in consideration of his near relationship, his being the family priest and the fact that he had incurred expenses for the maintenance of herself and her husband for the last five years and for the performance of religious rites, certain debts due by him to her deceased husband amounting to Rs. 1,000 were thereby remitted according to the dying wishes of her husband. The document concludes as follows: - "Therefore, as my deceased husband has directed me to make a gift of this our debt to you, and as you are a relation and Upadya—(family preceptor) of my deceased husband—thus for several reasons having looked at it from the point of view of my interests, worldly as well as religious, and after consideration of the whole, I have given the above property in Dana and gift." On the same day she made a will, Exhibit 66, in favour of defendant 4 and a grandson of defendant 1, a minor Pandurang, defendant 3, whereby she devised the immoveable property she inherited from her husband to the minor Pandurang absolutely and bequeathed the moveables in equal half shares between Pandurang and defendant 4. The second defendant in the case was the son of defendant 1, who died after the institution of the suit, and the third defendant was his grandson. Defendants 5 and 6 were added as defendants as they were said to be in possession of some of the property specified in the list annexed to the plaint.

Gita died in February 1904, and the plaintiff prayed that the property specified in his plaint, together with Gopal Shivram's ornaments and other articles in defendant 4's possession and the debts due to him by the latter be divided and an equal half share awarded to the plaintiff, but as above pointed out, the only defence in this appeal that we are concerned with is that of

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defendant 4, who resists the claim on the strength of the deed, Exhibit 65, executed in his favour by Gita. That deed, no doubt, was drawn up by a person having a little knowledge, but it is proverbial that that is a dangerous thing, for although it recites that the remission of defendant 4's debts to Gita's husband was given in pursuance of his directions, it has been found as a fact in both Courts that that statement was untrue, and the draftsman of the deed evidently accidentally omitted to bear in mind the fact that Gita's husband had been a lunatic for many years.

In the first place it is to be observed that moveable property inherited by the widow from her husband cannot now—after a great deal of discussion—be considered as her Stridhan strictly so called. This point must now be considered as settled—see *Sheo Shankar Lal* v. *Debi Sahai*[1], where the Privy Council say: "The decision of the High Court was based upon the text of the Mitakshara, which seems to make all property taken by a woman by inheritance her Stridhan with all the incidents which belong to that kind of absolute property, and to make it descend as such primarily to females, and in the special line prescribed for Stridhan strictly so-called. It cannot now be contended that the rule thus derived from the Mitakshara is law as to inherited property generally. The cases of *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*[2], *Bhugwandeen Doobey* v. *Myna Baee*[3], and *Chotay Lall* v. *Chunno Lall*[4], all of them Benares cases, as well as *Mutta Vaduganadha Tevar* v *Dorasinga Tevar*[5], and *Raja Chelikani Venkayyamma Garu* v *Raja Chelikani Venkataramanayyamma*[6], place it beyond doubt that property inherited by a woman from a male is not her absolute property, and passes on her death, not to her Stridhan heirs, but to the heirs of the male person from whom she inherited it."

Again, in *Lal Sheo Pertab Bahdur Singh* v. *Allahabad Bank*[7], their Lordships say: "In the present case their Lordships have had the advantage of hearing a full argument upon both sides.

(1) (1903) L. R. 30 I. A. 202 at p. 206.
(2) (1866) 11 M. I. A. 139.
(3) (1867) 11 M. I. A. 487.
(4) (1878) L. R. 6 I. A. 15.
(5) (1881) L. R. 8 I. A. 99.
(6) (1902) L. R. 29 I. A. 156.
(7) (1903) L. R. 30 I. A. 202 at p. 218.

The argument for the appellant was to the effect that the alleged power of the lady to alienate in the present case could be based only upon the literal interpretation of the Mitakshara, which seems to make all property inherited by a woman her Stridhan in the strict sense of the term with all the incidents of such property, including the free power of alienation; that that view of the Benares law had already been negatived by this Commitee in the case of property inherited from a male; that inheritance from males and that from females could not be differently treated; and that the authorities in most parts of India were to the effect that what a woman has inherited from a woman she does not hold as her absolute and alienable estate, but for a qualified estate, with reverter after her death to the heirs of her predecessor in title. The argument on the other side was based strictly upon the text of the Mitakshara, but it was contended that a distinction should properly be drawn between property inherited from males and that inherited from females; and an endeavour was made to show that the decisions in various provinces in India applying the doctrine of reverter to such cases were wrong. On the present point, as on that arising in the previous case, it is too late to contend for the literal meaning of the Mitakshara to the full extent. The previous decisions of this Committee have established that, under the Benares law, what a woman takes by inheritance from a male she takes not absolutely, but for a qualified estate alienable only under the conditions applicable to such an estate."

How far these two opinions of the Privy Council may affect the recognized rule in Bombay that, female heirs, except those who come into the family of the propositus by marriage, take absolute interests—a question, which was expressly left open by Sir L. Jenkins, C. J., in *Bhau* v. *Raghunath*[1], does not arise in the present case. But these opinions of the Privy Council in our judgment have an important bearing on the question before us.

The texts on the question are to be found at page 595 of Colebrooke's Hindu Law, Vol. II:—"Narada:—Property given to her by her husband through pure affection, she may enjoy at her

(1) (1905) 30 Bom. 237, see also *Gulappa* v *Tayawa*, 31 Bom. 453; 9 Bom. L. R. 834. Chandavarkar, J.

pleasure after his death, or may give it away, except land or houses." "Catyayana—What a woman has received as a gift from her husband, she may dispose of at pleasure after his death, *if it be moveable;* but, as long as he lives, let her preserve it with frugality; or she may commit it to his family. 2. The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy *the estate* until she die; after her, the legal heirs shall take it."

It will be observed that these two texts refer to what has been given to a woman as a gift by her husband, not inherited by her on her death, and in the second paragraph of Catyayana the childless widow may frugally enjoy the estate until she die.

Again in the Vyavahara Mayukha, Chapter IV, section 8, clause 4:—"As to the text of Catyayana—'After the death of the husband, the widow, preserving the honour of the family, shall obtain the shares of her husband, so long as she lives; but she has not property therein, to the extent of gift, mortgage, or sale'; it is a prohibition of gift of money, or the like, to the Bandi, Charana, and the like swindlers."

The judgment of the first Court herein which deals with the relations between Gita and defendant 4 contains some grounds, at all events, for the conclusion that this text might possibly be held applicable.

The next question to consider is: What is the principle applicable to the restriction sought to be imposed on the power of the widow over inherited moveable property?

The Privy Council in *Bhugwandeen Doobey* v. *Myna Baee*[1], thus give the principle.—"The reasons for the restrictions which the Hindu Law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing

(1) (1867) 11 M. I. A. 487 at p. 513.

the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule."

Again in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[1], their Lordships say: "It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Manu downwards, may be cited to show that, according to the principles of Hindu Law, the proper state of every woman is one of tutelage, that they always require protection and are never fit for independence. Sir Thomas Strange (see Strange on Hindu Law, Vol. I, p. 242) cites the authority of Manu for the proposition that, if a woman have no other controller or protector, the King should control or protect her. Again, all the authorities concur in showing that, according to the principles of Hindu Law, the life of a widow is to be one of ascetic privation (2 Colebrooke's Digest, 459). Hence, probably, it gave her a power of disposition for religious, which it denied to her for other purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated; perfectly uncontrolled in the disposal of her property; and free to squander her inherited wealth for the purposes of selfish enjoyment. . . . . Their Lordships are of opinion that the restrictions on a Hindu widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death."

Further in *Vijiarangam* v. *Lakshuman*[2], there is a passage in West, J.'s judgment (which is too long to quote in full here) showing how the Hindu Law—like other systems of jurisprudence—never treated women as independent.

This being so, it must be borne in mind that the right of absolute disposition did not enter into Vijnaneshwara's conception of the essentials of ownership—*Vijiarangam* v. *Lakshuman*[2].

(1) (1861) 8 M. I. A. 529 at p. 551. (2) (1871) 8 Bom. H. C. R. O. C. J. 244 at p. 265.

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The Full Bench in *Bhagirthibai* v. *Kahnujirav*[1] say as follows:—

"The completeness of a woman's estate in property taken by inheritance does not necessarily involve complete independence in dealing with it. The Mitakshara is careful to demonstrate that dependence is as consistent with full ownership in the case of a woman as of a child; and it seems likely that Vijnaneshvara looked to this dependence as a safeguard for the enlarged estate which he assigned to women."—See also West and Bühler, 3rd Edn., pp 318—320; Mandlik, pp. 365—367; Jolly's H. L., pp. 251, 252; Sarvadhikari H. L, 271—279, Manu, Chap. V, vv. 147—149; Chap. IX, vv. 1 and 2, Narada—Sacred Books of the East, p. 49. And as said by Peel, C. J., in *Hurrydoss Dutt* v. *Rungunmoney Dossee*[2], "The incapacity to alienate is not in any way inconsistent with an inheritance." And in the latest case on the subject—*Bhau* v. *Raghunath*[3]—it was held that except in the kind of stridhan known as Saudayika, a woman's power of disposal over her stridhan is during coverture subject to her husband's consent and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will.

Then as regards the distinction which has been made in Western India between the woman's power over moveables as distinguished from immoveables, it seems to us that we must take these words in the ancient texts with their meaning, so far as we can arrive at it, in the days of those texts and the commentaries on them. If we take the expressions as identical with the elaborate and technical meanings given to immoveables and moveables by modern English and Anglo-Indian Law we are apt to fail to realize and apply the underlying spirit of the Hindu Law. On this point West, J., in *Vijiarangam* v. *Lakshuman*[4] says:—"It seems a reasonable inference from these and other authorities that, as to immoveable property at any rate—and with immoveable property, according to the Hindu Law, is classed every kind of property producing a periodical income—the

(1) (1886) 11 Bom. 285 at p. 293.
(2) (1851) 2 Tay. & B. 279 at pp. 281, 282.
(3) (1905) 30 Bom. 229.
(4) (1871) 8 Bom. H. C. R. O. C. J. 244 at p. 265.

woman's ownership is subject to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice."

Before we refer to the cases which are cited to us by Mr. Gharpure for defendant 4, we must mention a very strong point made by Mr. Rao in his admirable argument for the plaintiff, and that is that even in the Mayukha there is not a text which distinctly and definitely supports the widow's absolute dominion and power over moveables inherited from her husband. Mr. Gharpure in his reply was forced to admit this, but he tried to get over the point by referring to Mandlik's Mayukha, p. 77, line 20. There it is said, "As for this text of Brahaspati:—'Whatever property, whether pledged or of any other kind, [the husband] possessed after division, that the wife shall enjoy after the death of her husband with the exception of immoveable property . . . . .' This refers to a wife having no daughter . . . . ."

It is, we think, very significant that the word there used is *enjoy*—not "give away or dispose of."

Mr. Gharpure referred us to a number of cases. *Bechur* v. *Baee Lukmee*[1], *Nathalram* v. *Nandkishor*[2], *Pranjeevandas* v. *Dewcooverbaee*[3], *Narsappa* v. *Sakharam*[4], but as pointed out by Mr. Rao all except *Narsappa* v. *Sakharam*[4] are under the Mayukha, and this latter case by its reference to the cases in 1 Bom. H. C. R., appears to have been decided more with regard to that than to the Mitakshara.

We do not, however, think it necessary to go back further than the Full Bench decision in *Gadadhar Bhat* v. *Chandrabhagabai*[5], where it was held that under the law of Mitakshara a widow has no power to bequeath moveable property inherited by her from her husband. Jardine, J., in referring the case discussed elaborately all the authorities then bearing upon it, and the result of the decision is thus given by Sargent, C. J., at

(1) (1863) 1 Bom. H. C. R. 56.
(2) (1863) 1 Bom. H. C. R. 209.
(3) (1859) 1 Bom. H. C. R. 130.
(4) (1869) 6 Bom. H. C. R. A. C. J. 215.
(5) (1892) 17 Bom. 690.

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page 711:—"In this state of the authorities, we think that the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the Presidency with regard to the devolution of the moveables so inherited, and to that extent, if the decision in *Damodar* v. *Purmanandas*[1], is to be regarded as necessarily giving the moveables that remain to the widow's heirs, it must be treated as of no authority. Assuming then, as we think we must, that the moveables existing at the time of the widow's death devolve, by inheritance, on her husband's heirs, we think the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs. We must, therefore, answer the question referred to us in the negative."

That case was followed in *Chamanlal* v. *Ganesh Motichand*[2], where it was held that even under the Mayukha a widow has no testamentary power of disposition over moveables which have been inherited by her from her husband.

Now, although no doubt, as the Privy Council say in *Rai Bishen* v. *Mussumat Asmaida Koer*[3], there may be a distinction between a gift *inter vivos* by deed, which operates at once, and a testamentary gift, which takes effect from the death of the testator, it must be remarked that in that case the document was in the nature of a family settlement. Still it must now be taken as well settled that by Hindu Law the analogy between gifts *inter vivos* and gifts by will is complete—see the cases referred to in Trevelyan on Hindu Wills, page 33; and Mayne, 7th Edition, page 533; and *Bai Motivahoo* v. *Bai Mamoobai*[4]; and *Seth Mulchand* v. *Bai Mancha*[5].

Further, it is to be observed that in *Harilal Harjivandas* v. *Pranvalavdas Parbhudas*[6] and *Bai Jamna* v. *Bhaishankar*[7], which were, however, decided before *Gadadharbhat* v. *Chandrabhagabai*[8]

(1) (1883) 7 Bom. 155.

(2) (1904) 28 Bom. 461.

(3) (1884) L. R. 11 I. A. 164 at p. 177.

(4) (1897) L. R. 24 I. A. 103.

(5) (1883) 7 Bom. 491 at p. 493.

(6) (1898) 16 Bom. 229.

(7) (1891) 16 Bom. 233.

it was held that moveable property inherited from her husband by a Hindu widow, if not disposed of by her, passes to the next heirs of her husband on her death, and that such property was not her personal property liable in their hands for her debts. These decisions certainly are not consistent with an absolute power over inherited moveables on the part of a widow.

The Madras High Court has lately held, though (as Mr. Mayne says, 7th Edition, page 569) without noticing the decisions of the Sudder Court to the contrary, that the restrictions upon a widow's estate apply to moveable as well as to immoveable property—*Narasimha* v. *Venkatadri*[1]; *Buchi Ramayya* v. *Jagapathi*[2].

Lastly, it is clear from the argument of Mr. Mayne's Hindu Law, 7th Edition, pages 869, 870, 871, that he supports the view of this question of law which we have above put forward

Seeing the enormous wealth which Hindus in India hold in a form of moveable property, *e.g.*, Government Paper, stocks and shares, which was unknown to the ancient text writers and commentators, it is perhaps as well that the law should be as we hold it is, and that their widows should not have an uncontrolled power of disposition in respect thereof after the death of their husbands. Possibly with the spread of education amongst, and the general emancipation of, their women, they may be led to call in aid the relief of Legislature.

We confirm the decree with costs

HEATON, J.—I will state as briefly as I can my reasons for holding that this appeal should be dismissed. Many decided cases have been referred to and considered. Most of them are mentioned in the judgments of the lower Courts and that of the learned Chief Justice and need not be further discussed in detail.

In this Court the validity of the gift which defendant 4 (the appellant) seeks to uphold, was based on the alleged absolute power of a widow to dispose by gift of moveables inherited from

(1) (1885) 8 Mad. 290. (2) (1884) 8 Mad. 304

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her husband. It was not contended, and after the findings of fact arrived at by both the lower Courts it could not be contended, that there was anything in the circumstances of the particular gift, which would render it valid, if the widow has not this absolute power. In this case, therefore, we are not called on to say how far the widow's power of disposal is fettered; but merely to decide whether or not it is absolute. On that point I have no doubt as to the answer; her power to dispose of moveables inherited from her deceased husband is not absolute.

The argument to the contrary is not based on unambiguous texts in the Smritis or the books of the commentators. Such texts as can be found are admittedly matters of controversy. But we do know that according both to the letter and spirit of the Hindu Law the widow is a dependent. In the other parts of India than Bombay approval has been refused to the doctrine that she has absolute power in disposing of moveables inherited from her husband. That doctrine is not approved by the Privy Council as appears from the quotations read by the learned Chief Justice. It is not, I believe, approved by the sentiment of modern Hindu even in Western India. It is certainly an undesirable doctrine even at the present time. For, to give a widow absolute control over valuable property is to expose her to the schemes of plausible but unscrupulous persons. If a concrete illustration be desired, it is furnished by this very case; for we may fairly assume that the truth is represented by the facts found by the first Court after a most careful and intelligent analysis of the evidence and not seriously attacked in appeal. The only matter, so far as I can understand, in support of that doctrine is a series of reported cases beginning with *Pranjeevandas* v. *Dewcoorerbaee*[1] and ending with *Damodar Madhowji* v. *Purmanandas*[2]. In the earliest of these cases the widow is held to have "uncontrolled power over the moveable estate." In *Bechur Bhugwan's case*[3] the phrase used was "absolute power over moveable property." Since then the phrase has usually been "absolute"; but the meaning is substantially the same

(1) (1859) 1 Bom. H. C. R. 130. (2) (1883) 7 Bom. 155.
(3) (1863) 1 Bom. H. C. R. 56.

whether that word or "uncontrolled" be used. There can, I think, be no doubt what was meant by "absolutely"; the meaning is illustrated by *Bhagirthibai's case*[1] and *Gandhi Maganlal's case*[2] It means not only that the owner has full power of disposal, but on her death the property descends to her heirs and not to the heirs of the last male holder.

We now know that moveables inherited from her husband by a widow descend on her death to his heirs, not to hers, and that she is without power to dispose of such property by will—see *Gadadhar's case*[3] and *Sha Chamanlal's case*[4] In other words, her power is not absolute and in holding otherwise the earlier decisions went beyond what is now the settled law Those early decisions certainly did not mean that the widow took an absolute estate during her life only, and in my opinion, cannot be so interpreted. To attach such a meaning to them would indeed be to arrive at a compromise between what they asserted and what has since been asserted; but it would be a compromise which would ignore the true meaning of both sets of decisions and which, so far as I can see, could not be successfully based either on the words or the spirit of either the Hindu Law or the decided cases.

Being, as I hold we now are, unfettered by the early decisions I am unable to find either reason or authority for the proposition that a widow takes absolutely moveables inherited from her husband Therefore, I think, this appeal must be dismissed.

Decree confirmed.

G. B. R.

(1) (1886) 11 Bom. 285.
(2) (1899) 24 Bom. 192.
(3) (1892) 17 Bom. 690.
(4) (1904) 28 Bom 453.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton

1907. *October 11.*

OCHHAVLAL CHANDRAPRASAD AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v* GOPAL KALYAN *alias* KESHAV (ORIGINAL DEFENDANT), RESPONDENT.*

Land Revenue Code (Bom. Act V of 1879), section 84[1]—Landlord and Tenant—Annual tenancy—Determination—Notice.

An annual tenancy to which the Land Revenue Code (Bom. Act V of 1879) applies cannot be determined under section 84 of the Code without the notice in writing required by that section.

SECOND appeal from the decision of D. G. Gharpure, Additional First Class Subordinate Judge of Surat with Appellate Powers, confirming the decree of Karsandas J. Desai, Subordinate Judge of Olpad.

Plaintiffs sued to recover possession of the land in suit, alleging that their predecessor had let out the land to the defendant's predecessor under a lease dated the 26th June 1848; that the defendant continued to hold the land under the terms of the original lease; that one of the conditions of the lease was that if default be made in the payment of rent on a particular day in the month of Chaitra every year it was open to the landlord to eject the defendant; that defendant having made default for four years, it was open to the plaintiffs to eject him without previous notice to quit; and that notwithstanding the default the plaintiffs had sent notices to the defendant to vacate by registered post, but he refused to accept them. Hence the suit.

* Second Appeal No. 11 of 1907.

(1) Section 84 of the Land Revenue Code (Bom. Act V of 1879) is as follows:—

84. An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next.

The cultivating season may be presumed to end on the 31st March.

An annual tenancy shall require for its termination notice given in writing by the landlord to the tenant, or by the tenant to the landlord, at least three months before the end of the year of tenancy, at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E or to the like effect.

The defendant admitted the lease referred to in the plaint and answered that the plaintiffs had no right to expect payment of rent on a fixed date; that according to the course of dealings between the parties rent was allowed to fall into arrears from three to four years; that he had tendered the rent for the years in suit to the plaintiffs, but they declined to accept it, and that the allegation with respect to notices to vacate was not true. The defendant further contended that he was a permanent tenant under the terms of the lease, that the plaintiffs had no right to sue in ejectment; and that if the non-payment of rent on the due date be held to have worked a forfeiture of his tenancy, the same should be relieved against.

The Subordinate Judge found *inter alia* that the lease did not create the right of permanent tenancy in defendant's favour; that it was not proved that plaintiffs had refused to pass receipts for the rent tendered to them; that non-payment of rent by the defendant worked forfeiture of his tenancy; that the forfeiture can be relieved against; that he was not served with a notice to quit as required by the Transfer of Property Act and Land Revenue Code; and that the plaintiffs were not entitled to recover possession of the land. He, therefore, dismissed the suit.

On appeal by the plaintiffs one of the issues raised in appeal was:—"Whether the lower Court was right in refusing to go into the question as to whether the defendant's tenancy was terminated otherwise than by forfeiture, *i. e.*, by the deaths of both lessors and lessee, and whether apart from forfeiture plaintiffs are entitled to possession on the strength of such determination." The Judge recorded a finding in the affirmative on the said issue and confirmed the decree, but expressed his opinion that no notice as required by law was proved it a finding on that point was necessary.

The plaintiffs preferred a second appeal.

L. A. Shah, for the appellants (plaintiffs):—Our predecessor in title gave the land in dispute to an ancestor of the defendant on terms which were embodied in the lease dated the 26th June 1818. At the date of the suit in the year 1904 the defendant was, in law, a tenant of the plaintiffs, holding the land as an annual

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton.

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OCHHAVLAL CHANDRAPRASAD AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GOPAL KALYAN *alias* KESHAV (ORIGINAL DEFENDANT), RESPONDENT.*

Land Revenue Code (Bom. Act V of 1879), section 84[1]*—Landlord and Tenant—Annual tenancy—Determination—Notice.*

An annual tenancy to which the Land Revenue Code (Bom. Act V of 1879) applies cannot be determined under section 84 of the Code without the notice in writing required by that section.

SECOND appeal from the decision of D. G. Gharpure, Additional First Class Subordinate Judge of Surat with Appellate Powers, confirming the decree of Karsandas J. Desai, Subordinate Judge of Olpad.

Plaintiffs sued to recover possession of the land in suit, alleging that their predecessor had let out the land to the defendant's predecessor under a lease dated the 26th June 1848; that the defendant continued to hold the land under the terms of the original lease; that one of the conditions of the lease was that if default be made in the payment of rent on a particular day in the month [illegible] year it was open to the landlord to eject the [illegible] made default for four years, it [illegible] ious notice to [illegible] had sent [illegible]

JENKINS, C. J.—The only question [illegible] whether an annual tenancy to which the Land Re[illegible] applies can be determined without a notice in writing [illegible] the landlord.

It is urged before us that it can, because there was a repudiation of the landlord's title.

As a matter of fact there was, in this case, no repudiation of the relation of landlord and tenant. But apart from that we must give effect to the express provisions of the Land Revenue Code.

It has been held as a fact that there has been an annual tenancy, and section 84 of the Land Revenue Code says: "An annual

(1) (1879) 4 Bom. 424. (3) (1881) 16 Ch. D. 730.
(2) (1883) 8 Bom. 228. (4) (1890) 15 Bom. 407.

tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

"An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenant, or by the tenant to the landlord, at least three months before the end of the year of tenancy, at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E or to the like effect."

No such notice was given in this case; therefore, the annual tenancy has not been determined.

The result is that the decree must be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1907. *October* 15.

SUNDRABAI JAVJI DAGDU PARDESHI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHIVNARAYANA RIDKARNA (ORIGINAL PLAINTIFF), RESPONDENT.*

SHIVNARAYANA RIDKARNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* SUNDRABAI JAVJI DAGDU PARDESHI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Mitakshara—Mayukha—Marriage—Samskara—Marriage of a coparcener—Family purpose.

According to Hindu law a debt contracted for the marriage of a coparcener in a joint Hindu family is binding on the other coparcener as a debt contracted for a family purpose and, therefore, for the benefit of the family.

Govindarazulu Narasimham v. *Devarabhotla Venkatanarasayya* (1) dissented from.

Under the Mitakshara as well as the Mayukha the word "Samskara" ordinarily includes marriage.

*Appeals No. 755 of 1906 and No. 299 of 1907.

(1) (1903) 27 Mad. 206.

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CROSS-APPEALS from the decision of C. Fawcett, District Judge of Ahmednagar, reversing the decree passed by H. A. Mohile, Joint Subordinate Judge at Ahmednagar.

Suit to recover money by sale of the property mortgaged.

The property belonged originally to one Javji Dagdu, who died leaving him surviving his two minor sons, Gulab and Keshav, and their mother Sundrabai. In May 1884 Sundrabai was appointed guardian of the minors' property and person under Bombay Act XX of 1864, which was then in force.

On the 15th June 1892 Sundrabai borrowed Rs. 585 from the plaintiff's father and on the same day passed a deed mortgaging the joint property of the minors. The sum borrowed was spent in the expenses of the marriage of her minor son Gulab, which took place on the 18th June 1892. To this mortgage no sanction was obtained by Sundrabai as required by section 29 of the Guardians and Wards Act (VIII of 1890). Gulab died some time after the marriage.

The plaintiff brought this suit to enforce the mortgage against Sundrabai and her son Keshav.

Defendant No. 1 (Sundrabai) contended that she was not entitled to the house mortgaged and that the suit was barred by limitation.

It was contended by Keshav *inter alia* that Sundrabai had no right to mortgage the property; that there was no necessity for borrowing the money; that he and his brother Gulab did not get any benefit from the mortgage money; and that the debt did not create a charge on the property.

The Subordinate Judge found that Sundrabai had passed the mortgage deed for valuable consideration; that the transaction embodied in the deed was not legally binding on Keshav, as no sanction of the District Court was taken under section 29 of the Guardians and Wards Act, 1890, and that therefore no relief could be granted to the plaintiff.

The plaintiff appealed. The learned Judge remanded the case to the Subordinate Judge for determination of the following issue:—

"Did defendant 2 or his deceased brother Gulab receive any benefit from the plaintiff's father under the mortgage bond, and if so, to what extent?"

In remanding this issue the learned Judge observed:—

"The appellant relied on the rulings in *Sinaya* v. *Munisami* (I. L. R. 22 Mad. 289) and *Tejpal* v. *Ganga* (I. L. R. 25 All 59) as entitling the mortgagee to a charge on the mortgaged estate to the extent of the consideration for the mortgage received by Sundrabai. These rulings are based on section 64 of the Indian Contract Act, under which the defendant 2, when rescinding this mortgage, as he is entitled to do, "shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

The finding of the Subordinte Judge on the remanded issue was that defendant 2 did not receive any benefit from the plaintiff's father under the deeds, but that his deceased brother Gulab did receive benefit to the extent of Rs. 585 under it.

The District Judge held accordingly that there was a legal obligation on defendant 2 as legal representative of Gulab, to restore Rs. 585 to the plaintiff, so far as he can do so, out of any assets or property derived by him from Gulab.

Both the parties preferred cross-appeals against this decree.

D. W. Pilgaonkar, for the defendants:—As Sundrabai was a guardian appointed by the Court, the mortgage executed by her without the sanction of the Court (section 29 of the Guardians and Wards Act VIII of 1890) is void. The minor is, therefore, entitled to repudiate the transaction on attaining his majority. See *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[1]. A guardian cannot contract a debt for the marraige of his ward without the sanction of the Court. Section 64 of the Indian Contract Act (IX of 1872) does not apply because the minor's marriage is not a benefit to him. Bhattacharya in his Hindu Law, p. 81, says, according to Manu, marriage of a minor is a sin. It is not a necessary *samskara*.

D. A. Khare, for the plaintiff:—Under Hindu Law marriage is an obligatory *samskara* and therefore the mother was under a legal necessity to borrow for the expenses of marriage. The

(1) (1894) 20 Bom. 61.

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shares of both the brothers are bound by the act of the mother acting as a guardian.

CHANDAVARKAR, J.:—The questions of Hindu Law, raised in these two second appeals from a decree of the District Court at Ahmednagar, depend upon certain facts which, as they have been found by that Court, are as follows:—

One Javji Dagdu died, leaving him surviving as his heirs two minor sons, Gulab and Keshav, and their mother, Sundrabai. On his death Sundrabai was appointed guardian of the minors' property and person in May 1884 under Bombay Act XX of 1864, which was then in force. On the 15th of June, 1892, Sundrabai borrowed Rs. 585 from the plaintiff Shivnarayan's father, Rid Karna, for the expenses of the marriage of her minor son Gulab, and executed in his favour a deed, mortgaging the joint property of the minors, which they had inherited from their father. No sanction, however, was obtained by her for the mortgage, as required by section 29 of the Guardians and Wards Act. The amount borrowed was spent on the marriage of Gulab. He, however, died some time after the marriage.

The plaintiff brought the suit, which has led to these two second appeals, to enforce the mortgage against Sundrabai as defendant 1 and Keshav as defendant No. 2.

The District Court has held that, though the mortgage is void under section 29 of the Guardians and Wards Act as against Sundrabai, it would be voidable as against the two brothers, Gulab and Keshav, under section 30 of the same Act; that under section 64 of the Indian Contract Act, which virtually corresponds to section 35 of the Transfer of Property Act, Gulab and Keshav would be liable to restore any benefit they might have received from the mortgage transaction before avoiding it. This view of law has not been impugned before us by either party.

The District Court has found that, so far as Gulab was concerned, he received a benefit from the transaction, because the money borrowed was spent for his marriage; that, therefore, he became liable to restore the benefit by repaying the money to the

plaintiff; and that this liability of his devolved on his death on his half share in the joint property, obtained by his brother Keshav (defendant No. 2), by survivorship.

Upon this finding the District Court has passed a decree for the sum with interest against Keshav (defendant No. 2), and directed that, in case of failure by him to pay within 6 months from the date of the decree, the plaintiff should recover it by sale of the half share of the deceased in the property specified in the mortgage-deed, which has come to defendant No. 2 by survivorship, and also from any other assets, if any, of Gulab in the hands of the said defendant.

It is contended for defendant No. 2 in his second appeal (No. 755) that this decree is erroneous in law. The argument is that when Gulab died, the whole of the joint property came to the latter by survivorship and that there was no half or other share of Gulab left which could be responsible for Gulab's liability, since a coparcener has never any determinate share in coparcenary property till partition. This argument loses sight of the effect which the mortgage effected by Sundrabai had on the coparcenary relations of the two brothers. Its effect, according to the Hindu Law prevailing in this Presidency, was to give an interest to the mortgagee in the joint family property to the extent of the share of the mortgagor and to entitle him to have that share determined by partition even after the mortgagor's death: *Rangayana Shrinivasappa* v. *Ganapabhatta*(1). The mortgage was indeed voidable by Gulab; but if he received any benefit from it, he could not have avoided it without restoring that benefit to the mortgagee. When he died, his liability devolved on his share in the property. So far, therefore, as the second Appeal preferred by Keshav, defendant No. 2, is concerned, it must fail.

The plaintiff in his second appeal No. 299 of 1907 complains that the District Court ought to have held that the marriage of Gulab was a family purpose, and that defendant No. 2 is as much personally liable to restore the benefit as Gulab was. This raises the important question whether, according to Hindu Law, a debt

(1) (1891) 15 Bom. 673.

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shares of both the brothers are bound by the act of the mother acting as a guardian.

CHANDAVARKAR, J.:—The questions of Hindu Law, raised in these two second appeals from a decree of the District Court at Ahmednagar, depend upon certain facts which, as they have been found by that Court, are as follows:—

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text, observes that "there appears [which has led to these two] is meant," in the said text, "by the term [against Sundrabai as] or sacramental ceremonies, some commentators ha[ve] ceremony of marriage in that term, and others declaring initiatory ceremonies to terminate with the investiture with the sacred thread." So far as the Mitakshara and the Vyavahara Mayukha, which are the principal governing authorities on Hindu law in this Presidency, are concerned, there is nothing expressly stated in either to show that the word *samskaras*, which ordinarily includes *marriage*, must be understood in the sense of excluding it in the interpretation of the texts in question. On the other hand, the context in which Yajnyavalkya's text is given in the Mitakshara, and Brihaspati's text is given in the Vyavahara Mayukha, implies that marriage was meant to be included in the word. The former text is a hemistich immediately followed by another, which relates to the marriages of sisters. After quoting the text of Brihaspati as to brothers, Nilakantha in the Vyavahara Mayukha quotes another text of the same *Rishi*, which

relates both to brothers and sisters, and the text of Yajnyavalkya relating to sisters in particular. In all these, the word used for "ceremonies," whether as applied to brothers or to sisters, is *samskaras*. In the case of sisters, it can have no meaning if marriage be excluded from it. And if marriage is included in the use of the word with reference to sisters, it must be understood as having been used in the same sense with reference to brothers also, since both brothers and sisters are mentioned in the same connection and the same word is used as to both. Logically speaking, this mode of interpretation of the texts would no doubt render it necessary that the word *samskaras* should be understood as also including the thread ceremony with reference not only to brothers but also sisters. So it would have been but for special texts, which expressly prohibit the thread ceremony in the case of females * and confine it to males, whereas there is no text which likewise prohibits marriage in the case of males. Hence the word *samskaras* (sacramental ceremonies) occurring in the texts abovementioned means all such ceremonies as are, according to the Shastras, applicable to males where the question is about males, and all such ceremonies as are applicable, according to the same Shastras, to females where the question is about females.

This interpretation has the sanction of some commentators, whose authority is of weight in this Presidency, though it is not equal to that of the Mitakshara and the Vyavahara Mayukha. For instance, Aparaka, in his commentary on the Yajnyavalkya Smriti, quotes the same text of Yajnyavalkya which Vijnaneshwara has quoted and expounded in the Mitakshara, and explains that the *samskaras* referred to in the text mean "the *Jata Karma* and other ceremonies" [1]. Now, these can be no other than the ceremonies or rites which begin with *Jata Karma* and the last of which is marriage. These are explained by Colebrooke

* Vijnaneshwara points this out in his exposition of *Smriti* No. 15 of Yajnyavalkya, in Chapter II on *Brahmachari*, section on *Achara* (Rituals), (page 5 of Bapu Shastri Moghe's Edition of the Mitakshara, 3rd Edition). See also Apararka, page 903, Anandashrama Series, where a *Smriti* of Manu is cited to show that *marriage* takes the place of the thread ceremony in the case of women. There is a *Smriti* of Yama to the same effect, quoted by Nilakantha in the Samskara Mayukha.

(1) See *Apararka*, Anandashrama Series, page 731.

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in his Digest on text 134, Chapter III, Book V (pages 301 and 302). Balambhatta in his commentary on the Mitakshara quotes the same text and says that the *samskaras* referred to by Yajnyavalkya are "the rites which end with marriage" [1]. So also a *Smriti* of Vyasa, quoted at page 78 of Vivadarnava Setu[2], says that "where there are several brothers, some of whom have had their sacramental ceremonies performed by their father, these on his death should perform the same ceremonies in *their consecutive order* in respect of the other brothers" out of the paternal estate. "In their consecutive order" means all the sacramental ceremonies, one after the other in succession. That must include marriage. In the Madana Parijata, Yajnyavalkya's text regarding the duty of an *initiated* brother to perform the sacramental ceremonies of his *uninitiated* brother is quoted and the explanation is added that the word *asamskrita* used by Yajnyavalkya means "uninitiated in the *samskaras* (sacramental ceremonies) which end with marriage." (The Madana Parijata, Bibliotheca Indica Series, page 648.) Medhatithi in his commentary on Manu quotes the same text of Yajnyavalkya and explains that the principle underlying it is that it is the father's "*right*" to perform the marriage ceremony of his son; and that in the absence by death or otherwise of the father, the right devolves on that son's elder brothers who supply the father's place. Medhatithi's reasoning is this. It is true, he says, that all the ceremonies up to and including the thread ceremony of a son must be performed by his father and that in respect of them the son is absolutely dependent on the latter; but though for the subsequent ceremonies there is not the same state of dependence, yet since the father in respect of the first ceremony (*jat karma*) has to recite the *mantra* which is:—"Though this is called my son, he is myself," the father has *power* or *right* as to the marriage also of the son and all other rites. Hence, says Medhatithi, the text of Yajnyavalkya, which makes it the bounden duty of the initiated brothers to bring about the *sams-*

(1) See the manuscript copy of the Commentary, which is in this Court, page 143. Also Stokes' Hindu Law Books: Note to para. 4, page 398.

(2) The reference is from an edition of this work published by the Shri Venkateshwar Press, Bombay.

karas of their uninitiated brothers out of the patrimony, on the father's death. (See Ráo Sáheb Mandlik's edition of the *Mánava Dharma Shástra*, pages 119 and 120.) The word used by Medhatithi for *right* is *adhikára*, which, according to certain *sutras* of Panini[1], involves the idea of authority with obligation, subject, of course, to discretion.

The Madras High Court in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*[2], on which the respondent's pleader in this second appeal before us relies, has held otherwise. According to that decision, in a joint Hindu family, consisting of a father and several sons, the marriage of any of the sons by the father is not, according to Hindu Law, a family purpose, because there is no moral or religious obligation on either the father or the coparcener, or, in the event of the father's death, on that coparcener's brothers, to bring about his marriage. With all deference to the learned Judges (White, C. J., and Moore, J.), who have held so, I venture to think that the decision rests upon a misapprehension of the texts, on which they have relied in their judgment, of the law expounded by Vijnaneshwara in the Mitakshara and by the author of the Smriti Chandrika, and, lastly, of the principles underlying and the practice obtaining in the joint Hindu family system.

First, it is not correct to say, as the learned Judges have said in their judgement, that "nowhere is marriage in the case of a male included among the initiatory ceremonies" and that "there is a complete absence of authority for the proposition that omission to perform the ceremony of marriage in the case of a male Bráhman entails a forfeiture of his caste or status." The question whether marriage is a necessary and obligatory ceremony or is only optional in the case of a male is discussed by

(1) The *sutras* are: *adhirishware, swamitena, adhikára, anabhihite.* Medathithi gives an illustration of his meaning of the word *adhikára* (page 384 of Ráo Sáheb Mandlik's edition of the *Mánava Dharma Shástra*) Accordingly, the words *adhikára* and *ishwara* are synonymous and mean "power." See West and Buhler's *Digest*, 3rd edition, page 232, where *ishwara* is translated as "power" and the learned authors of the *Digest* point out that it has a more comprehensive sense than that of "active authority" and implies a duty as well.

(2) (1903) 27 Mad. 206.

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Vijnaneshwara in the chapter of the Mitakshara on "The Duties of a Hermit" (yati), the last of the four *ashrámas* (orders of life) prescribed in the *shástrás* for a male of any of the three twice-born castes (see pages 309 and 310 of the Mitakshara published by Bapu Shastri Moghe, 3rd edition). There Vijnaneshwara deals with the different views of the *smriti* writers on the subject. The four *ashrámas* or orders of life are (1) the celibate or student (*brahmáchárin*), (2) the householder (*grihastha*), (3) the hermit (*vanaprastha*), and (4) the ascetic (*yati* or *sannyási*).

Now, there are, as pointed out by Vijnaneshwara, three schools of Hindu religion and law, representing three different views on the question whether all or any of these *ashrámas* are compulsory. For a clear apprehension of the discussion it is necessary to bear in mind at the outset the starting principle of the Hindu *shástrás* and of the Hindu law-givers and their commentators that no Hindu shall remain an *unashrámi* (one belonging to none of the four prescribed orders of life) "even for a single day."[1] And if a Hindu remain an *unashrámi*, he forfeits his *status* as a member of his caste, so much so that, on his death, no funeral ceremonies can be performed in respect of his soul.[2] According to Jabala, all these four orders of life are optional in the sense that one may enter from one of them into the other order consecutively or become an ascetic without having entered into the order of the householder or of the hermit. The school represented by Jabala is designated *the school of option* (*vikalpapaksha*) by Vijnaneshwara.

The second school is headed by Gautama and is called *the school of exclusion* (*badhapaksha*), because it excludes the last two *ashrámas* or orders of life. Gautama declines to recognize the last two orders and declares that the only *ashráma* or *status* of life allowable is that of the householder (*grihastha*), because "it is the only *ashráma* enjoined in the *shrutis*" (*i.e.*, the Vedas), and the *ashráma* of the celibate or student, which is entered into by means of what is called the thread ceremony (*upanayana*

(1) See a *smriti* of Daksha cited to that effect by Vijnaneshwara in his explanation to smriti No. 89 of Yajnyavalkya, Section on Ritual in the Mitakshara, page 25, Bapu Shastri Moghe's edition, 3rd edition.

(2) Page 275 of the same edition.

samskara) and which, according to all schools, is absolutely compulsory, is not an independent order but is only introductory to the *ashráma* (order) of the *grihastha* (householder). This text of Gautama is express authority for the proposition that marriage is the only obligatory order of life in the case of a male, and that, if he does not become a *grihastha,* he forfeits his caste and *status.*

That opinion is not shared by either Yajnyavalkya or Manu, who head the school which is styled by Vijnaneshwara *the school of aggregation* (*samuchchaya paksha*), because it regards all the four orders as an aggregate, each leading to the other in succession, according to the growing stages of a man's life. According to this school (as explained in the *Mitakshara*), no Hindu of a twice-born caste can enter into the last order (that of *yati* or ascetic) unless he has been a *grihastha* (householder or married man); that one may either remain unmarried, leading the life of a confirmed celibate (*naisthika brahmachári*), or enter into the married life. Either course of life, if properly led, leads to salvation. But then, no man is entitled to enter into the order of a confirmed celibate or perpetual student (*naisthika brahmachári*) unless he has the special qualifications prescribed for it. He must be what Medhatithi calls a *yama niyama,* or what Yajnyavalkya calls a *vijitendriya,* the meaning of both expressions, signifying the same sense, being that he must have the fullest power of self-control and possess the ability to discharge faithfully and literally *all* the duties and obligations attached to that order. If he has them not, he *must* enter into the married life. For this latter life a literal and strict observance of the duties prescribed for a householder are not necessary. All that is required of him, as explained by Vijnaneshwara in the section on rituals in the Mitakshara (page 33, Bapu Shastri Moghe's edition), is that he should discharge the duties of his order " to the best of his power." Vijnaneshwara substantially adopts this opinion of Yajnyavalkya and Manu.

According to that opinion, marriage is obligatory on those who are not competent and do not feel they are competent to lead the austere life of a *confirmed* celibate or an ascetic; if they do not marry, they become *patita* (outcastes) and forfeit their caste and *status.*

It follows from this exposition in the Mitakshara that, if an unmarried coparcener in a joint Hindu family thinks that he is not qualified either to continue a celibate to the end of his life or to become an ascetic, the rite of *marriage* in his case becomes a necessity; it is forced on him by the *shástrás*, inasmuch as he cannot remain without belonging to one of the four orders of life, and all orders are proscribed to him except the order of the householder. Marriage, therefore, in his case becomes an unavoidable purpose.

It is on this account that it is laid down in a *smriti* as an injunction binding on each Hindu that "by procreating sons and performing their *samskaras*" (*i. e.*, their initiatory or sacramental ceremonies), "he should set them up in life." This *smriti* is quoted by Vijnaneshwara in the chapter on "Resumption of Gifts" in the Mitakshara. The word *samskaras* there cannot be restricted to any particular ceremony excluding marriage, because, apart from the fact that the word is used in its ordinary sense in the *smriti* so as to comprehend all the ceremonies applicable to a male including that of marriage, the concluding words as to the duty "to set up a son in life" would have no proper significance if they did not refer to the life of a householder. In the case of a *confirmed* celibate or student (*naisthika brahmachárin*) or of an ascetic (*yati*) there can be no such thing as setting them up in life, their duty being to live on alms and lead a life of poverty.

It is by the light of these texts and discussions in the Mitakshara that the particular text in that work, on which the learned Judges of the Madras High Court have based their decision, should be interpreted. The text on which they rely is:—

"Even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." (Stokes's *Hindu Law Books*, page 376.)

The words "or the like" are interpreted by the learned Judges as not including "the marriage of a son." But if that

marriage becomes obligatory for the reasons I have set forth above, it becomes as much a family purpose as the obsequies of the father; and both are equally "unavoidable" by the family.

I think, therefore, that Mr Colebrooke's view regarding the word *samskaras* as it is used in the texts relating to the ceremonies, which initiated brothers are declared bound to perform in respect of uninitiated brothers out of their paternal estate, is correct, and that the decision of the Madras High Court in which that view has been held to be erroneous and devoid of authority, is not warranted by but is opposed both to the express texts (*smritis*) and the law as it has been expounded by such commentators as Vijnaneshwara in the Mitakshara, by Medhatithi, and others.

As to the remark of Dr. Jolly that, according to *some* commentators, the word *samskaras* terminates with the thread ceremony and does not include marriage, so far as my research has gone, I have not been able to find any commentator who has put that restricted meaning on the word as it has been used in the texts relevant to the case of a joint family. In any case, it is sufficient to say from the works of the commentators to whom this Court constantly refers in construing either the Mitakshara or the Vyavahara Mayukha, that there is none among them who has interpreted those texts in the sense of excluding *marriage* from the meaning of the word *samskaras*.

In the judgment of the Madras High Court, reliance is placed, however, upon the explanation in the Smriti Chandrika of a certain text of Narada (Section 41, page 56, and sections 42 and 43, page 57 of the Smriti Chandrika, translated by T. Krishna Swamy Iyer, 2nd Edition.) But it will be seen from a reference to the said text and to the explanation, that both of them relate, not to the subject of the marriage of a co-parcener in a joint Hindu family consisting of a father and his sons or of brothers, and owning ancestral property, but to the case of brothers, who, having no such property, do not constitute a joint family at all. The case of a joint family is expressly dealt with in the preceding three sections, 38 to 40. In section 38 the author of the Smriti Chandrika quotes the same text of Brihaspati

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each coparcener for that purpose every other coparcener is interested; and, so far as I am aware, it is upon that principle that the mutual relations of coparceners in Hindu families have been regulated up to this day.

So far I have dealt with the question in relation to the three twice-born castes only. As to *Shudras,* all authorities agree that the only *Ashrama* open is that of the householder; hence marriage is the only obligatory ceremony. [See Medhatithi's and Sarvajna Narayan's expositions on Manu at page 753 of the edition of the *Manava Dharma Shastra* published by Rao Saheb Mandlik. See also the Mitakshara, Chapters on *Brahmachari* and *Yati.* West and Bühler, 3rd Edition, page 1064, foot-note (*b*).]

It remains now to notice the last argument urged before us by the learned pleader for the respondents. The facts of the present case show that Gulab's marriage took place when he was a minor; and the learned pleader argues that, according to Manu, such a marriage was not obligatory on the family. The text of Manu relied upon is that "a man aged 30 years may marry a girl of 12, *if he find one* dear to his heart; or a man of 24 years, a damsel of 8; but if he finish his studentship earlier, and the duties of *his next order* would otherwise be impeded, let him marry immediately." (J. N. Bhattacharya's Commentaries on Hindu Law, page 81, 2nd Edition.) This text of Manu is explained by Medhatithi and other commentators as prescribing no limit of age for the marriage of a male but only as recommending that the bride should be younger than the bridegroom. (Rao Saheb Mandlik's edition of *the Manava Dharma Shastra,* page 1163.) The rules of the *Shastras* seem indeed to have been framed by the *Rishis* with the object of discouraging, if not prohibiting, the marriage of a male before he is at least 25 years of age. Nilakantha in his *Samskara Mayukha* states that 25 years should be allotted to each of the four orders of life. But usage has broken in upon the rule. Though the marriage of a minor boy may appear opposed to the intention, if not injunctions, of the *Shastras* and of the Commentators, and however objectionable it may seem to our modern ideas, usage having sanctioned such marriages, we must give effect to them and administer the law as it is, not as it should be.

For these reasons we must hold that defendant No. 2 is entitled to avoid the mortgage in dispute on payment to the plaintiff of Rs. 585 with interest at 6 per cent. per annum from the date of the said defendant's written statement. That must be taken to be the date on which he elected to avoid the transaction. Accordingly we substitute the following decree for that of the lower appeal Court :—

1. Declare that on payment, within six months from this date by defendant No. 2 to the plaintiff, of the sum of Rs. 585 and interest thereon at 6 per cent. per annum from the date of the said defendant's written statement to the date of payment, the mortgage in suit shall be null and void and of no effect and shall be delivered up by the plaintiff to the said defendant to be cancelled.

2. Declare that, in default of payment as above mentioned, the plaintiff shall be entitled to apply to the Court in this suit for and to have the usual mortgage decree on the said mortgage.

The suit as against defendant 1 is dismissed. She had no right to mortgage the property whether on her own behalf or as guardian and the mortgage in dispute is void as to her.

The decree of the lower appellate Court as to the costs in the lower Courts is confirmed. The plaintiff must have his costs of both the second appeals from the defendants.

KNIGHT, J. :—I concur.

Decree varied.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton.

1907. *October 17.*

GOKALDAS KALA THAKAR (ORIGINAL DEFENDANT), APPELLANT, *v.* GOVIND VISHVANATH APTE (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B[1]—Decree on mortgage—Direction to pay interest—Application to cancel direction.

A decree on a mortgage was passed by the First Class Subordinate Judge of Thána. The decree contained a direction for the payment of interest. After the decree was passed the Dekkhan Agriculturists' Relief Act (XVII of 1879) was made applicable to the Thána District. Subsequently in an execution proceeding under the decree the judgment-debtor, who was found to be an agriculturist, contended that the direction for the payment of interest in the decree should be cancelled under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B.

Held, that the section 15B does not empower the Court to cancel a direction for payment of interest contained in a decree. The interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify, in the particular manner there described, the terms of the payment.

SECOND appeal from the decision of C. C. Dutt, Joint Judge of Thána, confirming the order of Gulabdas Laldas, First Class Subordinate Judge, in a regular *darkhast*.

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* Second Appeal No. 381 of 1907.

[1] Section 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is as follows:—

15B. (*1*) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (*y*) or clause (*z*), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

(*2*) * * * *

(*3*) * * * *

(*4*) * * * *

The plaintiff had advanced Rs. 3,300 to the defendant on the mortgage of certain lands. The mortgage was without possession. Afterwards the parties appointed an arbitrator to take account of the mortgage transaction and to pass an award. The arbitrator having made the award, the plaintiff on the 26th March 1905 presented it to the Court of the First Class Subordinate Judge of Thána for being filed in Court and applied to have a decree passed in its terms. The Court accordingly passed a decree on the 30th March 1905 in the following terms:—

It is ordered that the award, Exhibit 3, passed by the arbitrator's Court be filed and it is further ordered in pursuance of the said award, Exhibit 3, that the defendant do pay to the plaintiff within six months from this day the sum of Rs. 3,443-8-0, being the sum awarded to him in the arbitrator's award, together with interest on the principal sum of Rs. 3,300 out of the said sum of Rs. 3,443-8-0 from the 26th of March 1905, at the rate of Rs. 21 in lump sum per mensem If the defendant fails to pay accordingly, the plaintiff shall recover, by sale of the mortgaged property referred to in the decree, the said sum of Rs 3,443-8-0 together with compound interest on the principal sum of Rs. 3,300 out of Rs. 3,443-8-0 from the 26th of March 1905 until payment at the rate of Rs 21 in lump sum for one month (interest being calculated) with twelve monthly rests and together with the costs of execution. In case of deficiency, (the amount due) may be recovered from the other property belonging to the defendant and from the defendant. Parties to bear their own costs of the suit.

After the above decree was passed the Dekkhan Agriculturists' Relief Act (XVII of 1879) was made applicable to the Thána District and the plaintiff thereafter presented an application to the Subordinate Judge, praying that his said decree *nisi* be made absolute and the decretal debt amounting to Rs. 3,579-8-7 together with further interest on Rs. 3,300 at 9 per centum compound interest be ordered to be recovered from the sale of the mortgaged properties and other properties of the defendant. A notice was issued to the defendant to show cause why the plaintiff's application should not be granted, and the defendant in response put in a written statement in which he stated that he was an agriculturist, that under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the history of the dealings from the commencement should be inquired into and the amount properly due be ascertained anew and

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that he should be allowed to pay up the same by yearly instalments of Rs. 300 each without further interest.

The Subordinate Judge found that the defendant was an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), that it was not open to him to ask that the decretal amount be ascertained again after an inquiry into the history of the past dealings and that he should be directed to pay the debt by instalments. The Subordinate Judge, therefore, passed the following order:—

The defendant should pay up the decretal amount with interest under the terms of the decree in two equal instalments payable on 10th January 1907 and on the corresponding date of 1908, that in default of the first instalment the whole amount then due should be recoverable at once by the sale of the mortgaged properties and the deficiency if any from the defendant's other property.

The following are extracts from the Subordinate Judge's judgment:—

He (defendant), however, cannot ask the Court to go behind the decree, re-open the accounts of dealings and to fix again the amount of his liability under the mortgage. The contractual relations between him and the decree-holder on the foot of the mortgage-deed having been converted into those of a judgment-debtor and a judgment-creditor the mortgage has merged into a Court's decree (I. L. R. 7 Bom 3'0).

In like manner it is not competent to the Court to make any alteration in the terms of the decree except as to the time and mode of payment for which an express authority is to be found in section 15B of the Act. The prayer that the interest at the compound rate on the sum of Rs. 3,300 from the date of the decree till satisfaction should be stopped is, therefore, not one that could be entertained.

The permission to pay up the decretal debt in instalment is not beyond the Court's authority under the Act.

On appeal by the plaintiff the Joint Judge found that the defendant was not an agriculturist and, in reversing the order of the Subordinate Judge, cancelled the order for instalments and directed that the *darkhast* proceedings should go on according to law. The reasons assigned by the Joint Judge for holding that the defendant was not an agriculturist were as follows:—

Defendant's own witness says that defendant's income from agriculture is at the most Rs. 450.

His decretal debts amount to about Rs. 7,000 to Rs. 8,000.

Besides, there are outstandings worth about Rs. 800 to Rs. 900. From this it is clear that the income from money-lending must exceed Rs. 400 and probably even Rs. 600.

Defendant is a Thákar by caste and has formerly always described himself as a trader. This would seem to confirm the conclusion that he is more a money-lender than a cultivator.

On second appeal by the defendant the High Court reversed the decree of the Joint Judge and sent back the case "in order that it may be decided on the evidence on the record."

On the remand the Joint Judge found that the defendant was an agriculturist and confirmed the order of the First Class Subordinate Judge.

The defendant preferred a second appeal.

P. B. Shingne, for the appellant (defendant):—Under section 15B of the Dekkhan Agriculturists' Relief Act it is competent to a Court to see whether the interest allowed by the original decree which is sought to be executed is proper or not. The decision in *Nathu Laxman* v. *Vazir*[1] supports this contention. If it were otherwise great injustice would be the result: see section 71A of the Act.

Section 15B of the Act applies even though the decree was based upon an award.

G. K. Dandekar for the respondent (plaintiff) was not called upon.

JENKINS, C J. :—This appeal arises out of the *proceedings in* execution of a decree passed under section 522 of the Civil Procedure Code in accordance with an award filed under section 526.

After the decree was passed the Dekkhan Agriculturists' Relief Act became applicable in the district and it is argued that the Court executing that decree can, not only prescribe instalments, but also modify the provision as to payment of interest contained in the decree by directing that interest should cease to run.

(1) (1907) 31 Bom. 460.

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The decree, though passed under the chapter of the Code which relates to references to arbitration, is in effect for sale. Therefore it is contended it comes within section 15B of the Dekkhan Agriculturists' Relief Act.

But the decree for sale to which that section applies must have been passed in a suit of the description mentioned in section 3, clause (*y*) or clause (*z*), and it certainly is a question whether an application under section 525 of the Civil Procedure Code is a suit of that description.

That, however, is a point on which it is unnecessary now to express a decided opinion, because there is another ground on which the appellant must fail.

In the first place, the Court undoubtedly has exercised a discretion in this matter and we can see no reason for interfering with that discretion in second appeal. And in the next place, we are unable to come to the conclusion that section 15B allows the Court to cancel a direction for payment of interest contained in the decree.

It is to be noticed that what that section says is that the Court in the course of any proceedings under a decree for sale may direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest as it thinks fit. But the interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify, in the particular manner there described, the terms of the payment.

It is suggested that the decision in *Nathu Laxman* v. *Vazir*[1] shows that the Court has power to cancel a direction for payment of interest contained in the decree, but that clearly is not so.

The case was not argued on that footing and the only point considered by the Court was as to whether, as had been argued, it was compulsory on the Court to award interest by reason of

[1] (1907) 31 Bom. 450.

the words "on such terms as to the payment of interest as it thinks fit." That is a different question from the one with which we are now dealing.

The result is that the decree must be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907.
November 13.

BAI HIRAKORE, WIDOW OF THAKARDAS JECHAND (ORIGINAL DEFENDANT), APPELLANT, *v* TRIKAMDAS HIRACHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Partition Act (IV of 1893), section 2—Decree for partition—Partition of a house in two divisions—The mode of division found inexpedient in execution of the decree—Power of Court to order sale of the house and to divide the sale-proceeds.

A decree for partition of a house ordered its division into two equal moieties. In execution of the decree this mode of division was found inexpedient, and the Court, therefore, ordered the house to be sold and the sale-proceeds to be equally divided between the parties under section 2 of the Partition Act (IV of 1893) On appeal—

Held, that the order was right, for section 2 of the Partition Act (IV of 1893) applies, not only where the Court has to pass a decree in a suit for partition, but also where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this section.

Kadir Bacha Saheb v. *Abdul Rahiman Saheb*(1) and *Hiramoni Dassi* v *Radha Churn Kar*(2) followed.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Surat, confirming the order passed by J. E. Modi, First Class Subordinate Judge of Surat.

Proceedings in execution.

* Second Appeal No 661 of 1906.

(1) (1901) 24 Mad. 630. (2) (1899) 5 Cal. W. N., 122.

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[1] (1907) 31 Bom. 450.

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BAI HIRAKORE, WIDOW OF THAKARDAS JECHAND (ORIGINAL DEFENDANT), APPELLANT, v. TRIKAMDAS HIRACHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

1907. *November* 13.

Partition Act (IV of 1893), section 2—Decree for partition—Partition of a house in two divisions—The mode of division found inexpedient in execution of the decree—Power of Court to order sale of the house and to divide the sale proceeds.

A decree for partition of a house ordered its division into two equal moieties. In execution of the decree this mode of division was found inexpedient, and the Court, therefore, ordered the house to be sold and the sale-proceeds to be equally divided between the parties under section 2 of the Partition Act (IV of 1893). On appeal—

Held, that the order was right, for section 2 of the Partition Act (IV of 1893) applies, not only where the Court has to pass a decree in a suit for partition, but also where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this section.

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SECOND appeal from the decision of Dayaram Gidumal, District Judge of Surat, confirming the order passed by J. E. Modi, First Class Subordinate Judge of Surat.

Proceedings in execution.

* Second Appeal No. 661 of 1906.

(1) (1901) 24 Mad. 639.

(2) (1899) 5 Cal. W. N. 123.

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Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. *November* 13.

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Proceedings in execution.

* Second Appeal No. 661 of 1906.

(1) (1901) 24 Mad. 639.

(2) (1899) 5 Cal. W. N. 1[illegible]

APPELLATE CIVIL.

Before Mr. Justice Knight and Mr. Justice Macleod.

1907.
November 14.

G. S. D, APPLICANT, *v.* THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY.*

Letters Patent, clauses 10, 39—High Court—Disciplinary jurisdiction—Suspension of Vakil—Leave to appeal—Privy Council.

The applicant, a Vakil of the Bombay High Court, was suspended from practice for a period of six months by the High Court in the exercise of its disciplinary jurisdiction under clause 10 of the Letters Patent. The applicant applied for leave to appeal to His Majesty's Privy Council.

Held, that no appeal lay by right of grant against the order, as it was not in the nature of a final judgment, decree or order under clause 39 of the Letters Patent. It was open to the applicant to proceed by way of petition to His Majesty the King for leave to appeal.

APPLICATION for leave to appeal to His Majesty's Privy Council under clause 39 of the Letters Patent.

The applicant, a Vakil of the Bombay High Court, was suspended from practice for a period of six months by an order of the High Court passed under clause 10 of the Letters Patent.

The applicant applied to the High Court against this order for leave to appeal to the Privy Council.

MACLEOD, J.:—These are two applications by a Pleader of this Court for leave to appeal to the Privy Council against two orders, dated the 21st August 1907 and 23rd September 1907 respectively, passed by this Court in the exercise of its disciplinary jurisdiction under clause 10 of the Letters Patent whereby the applicant was suspended from practice for the period mentioned therein. The applicant admits that his applications do not come within the provisions of Chapter XLV of the Civil Procedure Code, which deal with the procedure to be adopted in the case of appeals to the Privy Council, which are allowed to be made under clause 39 of the Letters Patent, but he relies on the decision of the Allahabad Court *In re S. B. Sarbadhicary*,[1] as reported in the Calcutta Weekly

* Civil Applications Nos. 540 and 541 of 1907.
(1) (1906) 11 Cal. W. N. 274.

granted, but in the second case a certificate was granted under section 595 of the Civil Procedure Code. However that may be, it appears from the report of *Sarbadhicary's case*[3] that the appeal was by special leave and therefore the permission granted by the High Court did not obviate the necessity of the appellant applying for special leave. It does not appear, moreover, that the question, whether the Court had power to grant the leave, was argued in *Sarbadhicary's case*, but that is the point at issue now before us. In *Morgan* v. *Leech*[4] the Judges of the Bombay Supreme Court had made a rule for the admission of attorneys which was contrary to the provisions of the Charter constituting the Supreme Court under the authority of 4 Geo. IV c. 71 and the appellants appealed against an order admitting the respondent as an attorney under the said rule. Their Lordships of the Privy Council held that the order not being in the nature of a judgment or determination was not an appealable grievance within the Charter, but it was competent to them to advise Her Majesty to grant the appellants leave to appeal. Following the analogy of that case we think that no appeal lies by right of grant against an order of the High Court under clause 10 of the Letters Patent, as it is not in the nature of a final judgment, decree or order under clause 39, and that therefore the High Court has no power to grant leave to appeal. The aggrieved party must proceed by way of petition to His [illegible] leave to appeal. See Safford and Wheeler's [illegible]es 726, 730 and 789. The rule [illegible] with costs.

Rule discharged.

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(1) (1895) 17 A l. 498.

(2) (1899) 22 All. 49.

(3) (1906) L. R. 34 I. A. 41: 11 Cal W. N. 273.

(4) (1841) 3 Moo. P. C. 368.

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CORRIGENDUM

(I. L. R. 31 Bombay.)

Page 204, line 4, *for* "Emperor *v* Ramchandra" *read* "Emperor *v*. Ramkrishna."

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See EVIDENCE ACT 111

COUNTRY-LIQUOR—*Attachment in execution of a money-decree—Sale—Abkari Act (Bom Act V of 1878), sec.* 16.

See ABKARI ACT 157

CRIMINAL PROCEDURE CODE (ACT V OF 1898), sec. 162—*Bombay City Police Act (IV of 1902), sec. 63—Indian Evidence Act (I of 1872), secs. 24 and 167—Amended Letters Patent, 1865, cl. 26—Statement made by a witness to and taken down in writing by a Police officer—Admissibility in evidence—Confession of accused, admissibility of*] One P., an entry clerk in the General Post Office, Bombay, was charged with having committed theft in respect of a registered letter. S., a friend of the accused, had made a statement to a Police Officer which the

document was wrongly admitted. On a review of the Full Bench

Held, having regard to section 162 of the Criminal Procedure Code (Act V of 1898), the said document ought not to have been admitted or used in evidence against the accused.

be used to contradict the ing it in the hands of the contradict the statement of S.

Per CHANDAVARKAR, J. —It is the statement contained in the writing which only could be used and that only to impeach the credit of such witness in the manner provided by the Indian Evidence Act (I of 1872).

Per BATTY, J.:—The writing might have been used for the purpose of refreshing the memory of the witness cross-examined as to the fact of the statement either on behalf of the prosecution or on behalf of the defence provided that it was treated by the prosecution only for the purpose of impeaching the credit or in corroboration of the witness who made it.

Per BEAMAN, J.:—The writing ought not to have been admitted at all, or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting the witness.

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Notes, from which it appears that in a similar case to this the learned Judges of the Allahabad Court, although they thought it was not necessary, granted leave to appeal, following the practice as laid down by two previous decisions of the Allahabad Court *In the matter of Parbati Charan Chatterji*[1] and *In the matter of Rajendro Nath Mukerji*[2]. In the first of these cases it does not appear from the report whether leave was granted, but in the second case a certificate was granted under section 595 of the Civil Procedure Code. However that may be, it appears from the report of *Sarbadhicary's case*[3] that the appeal was by special leave and therefore the permission granted by the High Court did not obviate the necessity of the appellant applying for special leave. It does not appear, moreover, that the question, whether the Court had power to grant the leave, was argued in *Sarbadhicary's case*, but that is the point at issue now before us. In *Morgan* v. *Leech*[4] the Judges of the Bombay Supreme Court had made a rule for the admission of attorneys which was contrary to the provisions of the Charter constituting the Supreme Court under the authority of 4 Geo. IV c. 71 and the appellants appealed against an order admitting the respondent as an attorney under the said rule. Their Lordships of the Privy Council held that the order not being in the nature of a judgment or determination was not an appealable grievance within the Charter, but it was competent to them to advise Her Majesty to grant the appellants leave to appeal. Following the analogy of that case we think that no appeal lies by right of grant against an order of the High Court under clause 10 of the Letters Patent, as it is not in the nature of a final judgment, decree or order under clause 39, and that therefore the High Court has no power to grant leave to appeal. The aggrieved party must proceed by way of petition to His Majesty the King for leave to appeal. See Safford and Wheeler's Privy Council Practice, at pages 726, 730 and 780. The rule must, therefore, be discharged with costs.

Rule discharged.

R. R.

(1) (1895) 17 All. 498.

(2) (1899) 22 All. 49.

(3) (1906) L. R. 34 I. A. 41: 11 Cal. W. N. 273.

(4) (1841) 3 Moo. P. C. 368.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1907.
February 1.

KARSONDAS DHARAMSEY, APPELLANT, *v.* GANGABAI AND OTHERS, RESPONDENTS.*

Application for leave to appeal to the Privy Council—Limitation—High Court's refusal to admit appeal after period of limitation—Civil Procedure Code (Act XIV of 1882), section 595—"Decree"—"Final decree passed on appeal", meaning of.

An order of the High Court refusing to admit an appeal after the period of limitation prescribed therefor by the Limitation Act is not a "decree passed on appeal" by a High Court under section 595 of the Civil Procedure Code and there is therefore no jurisdiction to grant leave to appeal therefrom to the Privy Council under clause (*a*) or (*b*) of that section.

Sunder Koer v. *Chandishwar Prosad Singh*,(1) followed.

THIS was an application for leave to appeal to the Privy Council against an order of the Appeal Court rejecting the applicant's application for admitting his appeal against the decree of Russell, J., passed in this suit on the 10th April 1901.

At the time of the institution of the suit as well as the passing of the decree the applicant was a minor and was accordingly represented in this suit by his guardians *ad litem*, duly appointed by the Court.

The applicant obtained majority in July 1905 and he thereafter on the 22nd August 1905 applied to the Appeal Court for the admission of his appeal under section 5 of the Limitation Act though out of time. In order to make out a "sufficient cause" for not presenting the appeal within time the applicant alleged that his guardians *ad litem* failed and neglected to do their duty by not appealing against the said decree within the usual 20 days' time.

The Appeal Court rejected the application with costs holding that the Court was not satisfied that there was any sufficient cause shown for not filing the appeal within time.

* Original Suit No. 573 of 1899.

(1) (1903) 30 Cal. 679.

Against this order the applicant applied to the High Court for leave to appeal to the Privy Council.

Setalvad, for the applicant.

Inverarity, for the respondents.

JENKINS, C J.:—This is an application for leave to appeal to the Privy Council from an order of the High Court refusing to admit an appeal after the period of limitation prescribed therefor by the Limitation Act.

The ground for this refusal was that the appellant had failed to satisfy the Court that he had sufficient cause for not presenting the appeal within the period of limitation. The decree from which it was then desired to appeal was one passed by a single Judge in the exercise of the High Court's Original Civil Jurisdiction.

The question now arises whether we have power to grant the leave sought.

Mr. Setalvad, for the applicant, argues that the order of refusal, having regard to the definition of "decree" in section 594 of the Civil Procedure Code, is a final decree within either clause (*a*) or clause (*b*) of section 595 of the Civil Procedure Code.

He does not rely on clause (*c*).

But can it be said that this is a final decree *passed on appeal* by a High Court?

The meaning of the expression "passed on appeal" has been settled by a line of authorities, which it is right that we should follow: see *Sunder Koer* v. *Chandishwar Prosad Singh*[1] and the cases there cited. And applying that interpretation to the circumstances of this case, it cannot (in my opinion) be said that there is here a decree passed on appeal by a High Court.

Then can it be said that this is a final decree passed by a High Court in the exercise of Original Civil Jurisdiction?

The meaning of the words *Original Civil Jurisdiction* is made clear by clause 12 of the Letters Patent read with clause 15. The application was made not to a Judge exercising Ordinary

(1) (1903) 30 Cal. 679

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Original Civil Jurisdiction, but to the High Court, represented by a Bench of two Judges, as the tribunal to which the appeal from the decree of the single Judge would lie.

Therefore the order of refusal was not a decree, passed by a High Court in the exercise of Original Civil Jurisdiction.

It is true that in *Ram Narain Joshi* v. *Parmeswar Narain Mahta*(1) the Privy Council did consider whether the power of admitting an appeal beyond time might have been exercised.

But that in no way concludes the present case, for it does not appear from the report either in the Law Reports or in *Ram Narain Joshi* v. *Parmeswar Narain Mahta*(1) that the appeal to the Privy Council was preceded by leave obtained from the High Court under chapter 45 of the Civil Procedure Code.

But that is not all, for from the judgment delivered by Sir Arthur Wilson it would seem that in that case there had been a dismissal of the appeal, and that clearly would be a final decree passed on appeal.

Therefore it appears to me we have no jurisdiction to give the leave sought either under clause (*a*) or clause (*b*) of section 595, and it is on those clauses alone that the applicant has relied.

The application will be dismissed with costs

Application dismissed.

Attorneys for the applicant: Messrs. *Craigie, Lynch and Owen.*

Attorneys for defendants: Messrs. *Mansukhlal, Jamsetji and Hiralal*, and Messrs *Daphtary, Farreira and Divan.*

B. N. L.

(1) (1902) 30 Cal. 309.

FULL BENCH.

ORIGINAL CRIMINAL.

Before Mr. Justice Russell, Acting Chief Justice, Mr. Justice Chandavarkar, Mr. Justice Batty, Mr. Justice Davar and Mr. Justice Beaman.

EMPEROR *v.* NARAYAN RAGHUNATH PATKI.*

1907.
June 25.

Criminal Procedure Code (Act V of 1898), section 162—Bombay City Police Act (Bom. Act IV of 1902), section 63—Indian Evidence Act (I of 1872), sections 24 and 167—Amended Letters Patent, 1865, clause 26—Statement made by a witness to and taken down in writing by a Police officer—Admissibility in evidence—Confession of accused, admissibility of.

One P, an entry clerk in the General Post Office, Bombay, was charged with having committed theft in respect of a registered letter S, a friend of the accused, had made a statement to a Police Officer which the latter had taken down in writing. At the trial S. denied having made the statement, whereupon, the Presiding Judge admitted the statement in evidence both to discredit S. and also as evidence against P. in that it contained statements made to the Police corroborating confessions made by P. These confessions were also used in evidence against P. On the application by P.'s Counsel, the Advocate General certified under clause 26 of the Amended Letters Patent that the said document was wrongly admitted. On a review of the Full Bench

Held, having regard to section 162 of the Criminal Procedure Code (Act V of 1898), the said document ought not to have been admitted or used in evidence against the accused.

Per RUSSELL, Ag. C. J.:—The document might be used to contradict the witness not by putting in the statement, but by putting it in the hands of the Police Officer to refresh his memory and to get him to contradict the statement of S.

Per CHANDAVARKAR, J.:—It is the statement contained in the writing which only could be used and that only to impeach the credit of such witness in the manner provided by the Indian Evidence Act (I of 1872).

Per BATTY, J.:—The writing might have been used for the purpose of refreshing the memory of the witness cross-examined as to the fact of the statement either on behalf of the prosecution or on behalf of the defence provided that it was treated by the prosecution only for the purpose of impeaching the credit or in corroboration of the witness who made it.

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* Case No. 11, Third Criminal Sessions of 1906. Reference to Full Bench on a certificate granted by the Advocate General.

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EMPEROR v. NARAYAN RAGHUNATH PATKI.

Per BEAMAN, J.:—The writing ought not to have been admitted at all, or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting the witness.

The question was also raised by Counsel for the Crown whether under clause 26 of the Letters Patent the Court had power to review the case only *qua* the wrongly admitted evidence or had power to review all the rest of the case.

Held, by RUSSELL, AG. C. J., CHANDAVARKAR and BATTY, JJ. (DAVAR and BEAMAN, JJ. dissenting) that the Court has power to review the whole case.

Per DAVAR, J. —Under clause 26 the Court is at liberty to review the case or part of the case for the purpose of determining the point or points of law which are either reserved for its opinion or certified by the Advocate General to be wrongly decided. It is not open to the Court in review to go behind the record of the case and enter into an elaborate investigation as to whether each particular piece of evidence recorded by the Judge was or was not rightly admitted.

Per BEAMAN, J.:—If the party did not object, did not ask for a certificate in respect of evidence which is challenged for the first time after the trial, at the hearing before the Court of Reference, the objection comes too late.

The further question was raised by Counsel for the accused whether the confessions of the accused were irrelevant under section 24 of the Indian Evidence Act (I of 1872).

Held, the confessions were rightly admitted in evidence.

Per BATTY, J.:—It is not sufficient to render a confession irrelevant under section 24 that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.

Per DAVAR, J.:—In the absence of the point being reserved or certified by the Advocate General the Full Bench has no right to sit in appeal on the decision that the confession was legally admissible in evidence.

REFERENCE and review of a case decided in the Third Criminal Sessions of 1906 of the High Court of Bombay by Russell, J., and a common jury on a certificate of the Advocate-General under clause 26 of the Amended Letters Patent of 1865 obtained by the prisoner's counsel.

The accused Narayan Raghunath Patki, who was an entry clerk in the General Post Office, Bombay, was charged before Russell, J., and a common jury with having committed theft in respect of a registered letter No. 477, alleged to contain currency notes of the value of Rs. 80 and four Goa lottery

tickets. Before the commencement of the trial the accused had made two oral statements, one to his cousin, Anant Narayan, and the other to his immediate superior in office, Chattarsingh. Both these persons were examined as witnesses for the prosecution. The accused had also made a third statement to H. S. Hooper, Acting Presidency Post Master, who reduced it to writing and it was put in at the hearing as Exhibit B. It was as follows:—

EXHIBIT B.

Statement of Narayan Raghunath Patki, clerk, Inland Registration Department.

On the 9th December 1905 at about 7-30 p m. Mr. P. W. Karandikar, Senior Clerk, Inland Registration Department, opened the B-3 (Ahmedabad) combined registered bag and transferred the contents to Shantaram Narayan, Checker. During the transfer of the letters one letter fell under the table. I picked up the letter and showed it to Mr. Bezonji, Joint Head Clerk on duty. When I picked up this letter no one observed me doing so. Mr. Bezonji told me to keep the letter with me. In the meantime my friend Mr. Shankar Vishnu Naik, a Clerk in the Accountant General's Office, came to the window and called for me and gave me an ordinary packet containing a tin case to post it for Banda. Mr. Bezonji had seen that article and he took it from me, and it is now ascertained that the same was delivered at Banda as a registered article bearing No. 227 to the addressee, S. B. Kamat, who was the addressee of the ordinary packet received by me from my friend Mr. S. V. Naik who is the nephew of the addressee. On leaving the office at about 12 o'clock (noon) I asked Mr Bezonji what was to be done with the registered letter in my possession which I had picked up from beneath the table, and he told me to keep it with me and told me that the ordinary packet given to me by my friend had been substituted by him (Mr. Bezonji) for the registered letter and he would see that the account was made correct. He told me to open this [illegible]

[illegible]

to hand over these notes to Mr. Bezonji whom I met in the verandah facing the Public Works Department, Secretariat, as arranged the night before, and I there handed over to him the whole of the contents of the letter except the lottery tickets. Mr. Bezonji gave me back currency notes to the value of Rs. 30. I refused to accept them but Mr. Bezonji forced me to take them saying "that if you will not take them I shall take your name that you have opened

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the letter" and I took them being afraid. About 8 days ago I came to know that after the lists of the 9th December had been checked and that the No. 227 was not traceable as received in the office, but was shown in the registered list as sent to Banda and that the receipt for the same had been called for from that office and the addressee had also been asked to give the name of the sender and office of posting. I consulted my friend Mr. S. V. Naik how to settle this matter, and he advised me to send my brother's son to Banda and settle with the addressee, not to give the name of the sender, and I accordingly sent him, and received a telegram from him on the 11th instant saying "Reached safely," "grandfather all right," which meant that the addressee agreed not to give the name of the sender of the substituted letter which was delivered to him as a registered article and for which he had signed a receipt. I heard yesterday that the addressee had been summoned by the Police to give evidence in Court in the case now proceeding against Mr. P. W. Karandikar and fearing that the truth would leak out, I confessed the whole affair to my brother K R Patki, who thought it best to bring me before you to make a full statement of the case Recorded by me this day.

(Sd.) J. HOOPER, Witness, (Sd.) NARAYAN RAGHUNATH
Presidency Post Master. (Sd) CHATTARSING PATKI
April 13, 06. 13-4-06.

The accused's friend Shankar Vishnu Naik had also made a statement to one Narayanrao, a Police Officer, who took it down in writing. At the trial Shankar Vishnu Naik being questioned with respect to the statement, he denied having made it. Thereupon, Narayanrao, the Police Officer, was examined and was asked as to whether Shankar made the said statement and he having answered in the affirmative, the statement was recorded as Exhibit N. It ran as follows:—

EXHIBIT N.

Shankar Vishnu Naik.

I am a Gowd Saraswat by caste and am at present employed in the Accountant General's Office on pay of Rs. 30. I know one Narayan Raghunath Patki for the last 5 years. I used to reside in Shantaram Kshatriya's chawl in Girgaum, along with Narayan Raghunath Patki. On the 9th December last, I was residing with Patki in the abovementioned chawl. I now reside with him at Matunga in a hut. About 4 months ago I purchased one box containing ring-worm ointment from Messrs. Bhica, Kalyan & Co., near the Jumma Mosque for 4 annas. I wrapped it up in a piece of paper and wrote the address S. B. Kamat, Banda, Sáwantwádi, thereon and gave it to Narayan Raghunath Patki at his room in Shantaram's chawl and asked him to post it. He received

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it and I then left. I had purchased the ointment for Mr. S. B. Kamat who is my uncle. I then did not ask him anything about the ointment believing that it was duly despatched. I have not heard anything from my uncle S. B. Kamat for about a month. I expect a letter from him. On about Saturday, the 7th instant, at about 8 a.m. Narayan told me that he had taken out a registered letter about 4 months ago which contained some notes and cheques; and sent the packet given by you to me in its stead and asked me what to do. I advised him to send his brother's son to Banda to tell S. B. Kamat not to disclose my name to the Postal Officer. Next day on morning at about 7 a.m., I, Narayan and Bhalchandra met together in open space next to hut when I told Bhalchandra in the presence of Narayan what Narayan had done. I and Narayan then asked Bhalchandra to arrange either to go personally or send some one to Banda and ask the addressee not to disclose the name of the sender. We then asked Bhalchandra to send us a wire in code words informing the result.

In his charge to the jury the presiding Judge used the said *statement not merely for the purpose of impeaching* Shankar's credit, but also as evidence against the accused, because it contained statements made by Shankar to the Police, corroborating the accused's confession. The jury unanimously found the accused guilty but recommended him to mercy on the ground that the Post Office Service was greatly defective and exposed him to many temptations. The presiding Judge, thereupon, sentenced the accused to undergo rigorous imprisonment for six years.

Some time after the said conviction and sentence, the Advocate General at the request of Mr. Murzaban, the prisoner's Counsel, certified under clause 26 of the amended Letters Patent, 1865, to the following effect:—

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT:
Bombay, October 16th, 1906.

Whereas one Narayan Raghunath Patki was prosecuted and convicted at the Third Criminal Sessions of 1906 holden in the High Court of Judicature at Bombay and was upon such conviction on the 20th day of July 1906 sentenced by the Honourable Mr. Justice Russell to suffer rigorous imprisonment for a term of six years, and whereas at the trial of the said Narayan Raghunath Patki it was decided by the said learned Judge that a certain document marked as Exhibit N. and purporting to be a written record of a statement made by one Shankar, a witness for the prosecution in the case, and taken d

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Police Officer, was admissible in evidence against the said Narayan Raghunath Patki, and the same was so admitted in and used as evidence against the said Narayan Raghunath Patki. Now I, at the request of the counsel for the said Narayan Raghunath Patki, certify that in my judgment the said document was wrongly so admitted and that there is accordingly an error in the decision of a point of law decided by the said learned Judge.

(Signed) G. R. LOWNDES,
Advocate General, *Pro-tem.*

Owing to the said certificate the case was fixed for a review by a Full Bench composed of Russell, Acting C. J. and Chandavarkar, Batty, Davar and Beaman, JJ.

Robertson (with *Murzaban* and *C. A. Rele*) for the prisoner:—The written statement, Exhibit N., of the witness Shankar taken by the Police Officer was not at all admissible in evidence and could not be used against the accused. If the document was not admissible, its contents also were equally so. Section 162 of the Criminal Procedure Code is incorporated *verbatim et literatum* in the Bombay City Police Act of 1902. In the present Criminal Procedure Code, section 162 is amended. Even before the section was amended, such a statement was not allowed to be used by the accused on his behalf, *a fortiori* it could not be used against him: *Queen-Empress* v. *Sitaram Vithal*(1), *Queen-Empress* v. *Madho*(2), *Queen-Empress* v. *Taj Khan*(3), *Isab Mandal* v. *Queen-Empress*(4), *Queen-Empress* v. *Haribai*(5).

The statement was used to fill up a gap in the evidence against the accused and was read to the jury. The dangers of the use of such statements are pointed out in *Isab Mandal* v. *Queen-Empress*(4).

If the said statement is excluded then there is no other evidence against the accused except his confession and that confession also is not admissible. It was made by the accused to his superior officer, who, it appears, had induced the accused to make it. There are certain facts in the statement which were known only to Chattarsingh, and it bears eminent traces of suggestions

(1) (1887) 11 Bom. 657.
(2) (1892) 15 All. 25 at p. 26.
(3) (1894) 17 All. 57 at p. 59.
(4) (1900) 28 Cal. 348 at p. 351.
(5) (1897) Unrep. Cri. C. p. 935.

coming from him. There was enmity between Bezonji, mentioned in the confession, and Chattarsingh and the latter tried to get the accused to implicate the former in the commission of the offence. The confession of the accused implicated Bezonji, but the presiding Judge found that Bezonji was innocent. This fact itself indicates that the accused was induced by Chattarsingh to make the confession. There are also certain other matters in the confession which were found to be untrue. Where, therefore, a confession contains facts which are proved to be untrue and which were chiefly induced by the accused's superior officer, it cannot be admitted as evidence against him.

The confession is an extra judicial one. It is irrelevant under section 24 of the Evidence Act, being obtained by means of inducements, threats or promises. All the evidence in the case contradicts the details of the confession. It was retracted when the accused pleaded not guilty. There is not a single case in which, the facts in a confession having been found to be untrue, a conviction has taken place: *Queen-Empress* v. *Mahabir*[(1)], *Queen-Empress* v. *Gharya*[(2)].

Even if it be held that the accused has committed an offence, he ought to have been charged under section 68 of the Indian Post Office Act.

Wadia (with *E. F. Nicholson*, Public Prosecutor) for the Crown:—The statement of Shankar, Exhibit N., was not originally let in for the purpose of using it against the accused. It was put in merely to contradict Shankar when, in the Sessions Court, he denied having made it to the Police Officer. The present Criminal Procedure Code came into force in the year 1898. The cases cited for the accused are all cases decided prior to that year. Besides they only show that such a statement is admissible for the purpose of corroborating or contradicting a witness.

The Court sitting in revision cannot go into the question whether the confession was admissible or not. The Advocate General has certified only that the statement of Shankar taken down by the Police Officer was not admissible in evidence.

(1) (1895) 18 All. 78. (2) (1894) 19 Bom. 728.

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Police Officer, was admissible in evidence against the said Narayan Raghunath Patki, and the same was so admitted in and used as evidence against the said Narayan Raghunath Patki. Now I, at the request of the counsel for the said Narayan Raghunath Patki, certify that in my judgment the said document was wrongly so admitted and that there is accordingly an error in the decision of a point of law decided by the said learned Judge.

(Signed) G. R. LOWNDES,
Advocate General, *Pro-tem.*

Owing to the said certificate the case was fixed for a review by a Full Bench composed of Russell, Acting C. J. and Chandavarkar, Batty, Davar and Beaman, JJ.

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The statement was used to fill up a gap in the evidence against the accused and was read to the jury. The dangers of the use of such statements are pointed out in *Isab Mandal* v. *Queen-Empress*[4].

If the said statement is excluded then there is no other evidence against the accused except his confession and that confession also is not admissible. It was made by the accused to his superior officer, who, it appears, had induced the accused to make it. There are certain facts in the statement which were known only to Chattarsingh, and it bears eminent traces of suggestions

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The confession is an extra judicial one. It is irrelevant under section 24 of the Evidence Act, being obtained by means of inducements, threats or promises. All the evidence in the case contradicts the details of the confession. It was retracted when the accused pleaded not guilty. There is not a single case in which, the facts in a confession having been found to be untrue, a conviction has taken place: *Queen-Empress* v. *Mahabir*[1], *Queen-Empress* v. *Gharya*[2].

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The Court sitting in revision cannot go into the question whether the confession was admissible or not. The Advocate General has certified only that the statement of Shankar taken down by the Police Officer was not admissible in evidence.

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Therefore this Court cannot now review the whole case and determine whether other evidence was rightly admitted or not: clause 26 of the Amended Letters Patent. Now the only point which can be considered is that on which the certificate was granted.

Robertson, in reply:—This Court can go into the whole evidence in the same manner as the Court of the Crown Cases Reserved in England. Clause 26 of the Amended Letters Patent received a wide interpretation in *Reg.* v. *Navroji Dadabhai*[1]. See also *Imperatrix* v. *Pitambar Jina*[2], *Queen-Empress* v. *O'Hara*[3], *Queen* v. *Hurribole Chunder Ghose*[4], *Subrahmania Ayyar* v. *King-Emperor*[5].

RUSSELL, AG. C. J.—The accused in this case one Narayan Raghunath Patki, an Entry Clerk in the General Post Office, Bombay, was charged before Russell, J., and a common jury that he being an officer of the Post Office, *viz.*, a clerk in the Inland Registration Department, committed theft in respect of a registered letter 477, containing currency notes of the value of Rs. 80 and four Goa lottery tickets, which was in the course of transmission from Ahmedabad to Goa and thereby committed an offence punishable under section 52 of Act VI of 1898, and was found guilty and sentenced to six years' rigorous imprisonment.

On the 16th October 1906, the Acting Advocate General Mr. Lowndes certified that a certain document marked as Ex. N. and purporting to be the written record of a statement made by one Shankar, a witness for the prosecution in the case, and taken down by one Narayanrao, a Police Officer, was wrongly so admitted and there was accordingly an error in the decision of a point of law decided by the said learned Judge.

The said Ex. N is to be found at page 50 of the printed book herein and was in the first instance admitted to contradict the said witness Shankar, but it is not necessary further to refer to this matter as we are all of opinion that having regard to the terms of section 162 of the Criminal Procedure Code the said

(1) (1872) 9 Bom. H. C. R. 358.
(2) (1877) 2 Bom. 61.
(3) (1890) 17 Cal. 642.
(4) (1876) 1 Cal. 207.
(5) (1901) 25 Mad. 61 at p. 74.

document ought not to have been admitted or used in evidence against the accused, although, no doubt, it might be used to contradict the witness not by putting in the statement but by putting it in the hands of Narayanrao to refresh his memory and get him to contradict the statement of Shankar.

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It remains for us, therefore, to consider whether there was sufficient evidence *aliunde* in support of the conviction.

A question has been raised, however, under clause 26 of the Letters Patent as to the meaning of the words therein: "The said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law." Does this mean that the High Court is to have power to review the case only *qua* the wrongly admitted or wrongly rejected evidence, or does it mean that the High Court has power to review all the rest of the case? *e. g.* in the present instance can this Court go into the question of fact—as asked to do by the prisoner's counsel—whether the prisoner's confession and especially Ex. B were induced by a threat, promise or inducement and therefore are irrelevant under section 24 of the Evidence Act?

Upon this question it must first be observed that it has been held that section 167 of the Evidence Act applies to criminal trials by jury in the High Court—see *Reg.* v. *Navroji Dadabhai*[1], *Queen* v. *Hurribole Chunder Ghose*[2], and *Imperatrix* v. *Pitamber Jina*[3].

Section 167 provides that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." "Evidence" means and includes (so far as is material to the present case) by section 3 of the Evidence Act "all statements which the Court permits or requires to be made before it by

(1) (1872) 9 Bom. H. C. R. 358. (2) (1876) 1 Cal. 207.
(3) (1877) 2 Bom 61, 65.

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witnesses in relation to matters of fact under inquiry." By section 5 "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others." By section 24 "a confession made by an accused person is irrelevant in a criminal proceeding, if the making of it appears to the Court to have been caused by any inducement, threat, etc."

It appears to me therefore that to enable this Court to arrive at a conclusion that there is in this case sufficient evidence (besides the rejected evidence) to justify the convictions this Court must make up its mind as to whether the confessions of the accused are irrelevant within section 24. Further it would I think be difficult to put a different meaning on the word "review" in a criminal case from that which is put upon it in a civil case. See section 630 of the Civil Procedure Code and *Sainal Ranchhod* v. *Dullabh Dvarka*[1].

In the present case this question arises with reference to certain confessions made by the accused, for it was argued by the prisoner's counsel that certainly the confessional statement Ex. B had been obtained by the witness Chattarsingh from the accused by means of inducement, threat or promise.

As above pointed out, the prisoner's counsel laid great stress upon the Ex. B. which is to be found at pages 42 and 43 of the printed book. But in my opinion the evidence shows that there were not one but three statements in the nature of confessions made by the accused which were deposed to at the hearing. The first is by the witness Anant. He deposes:—

Accused spoke to me the next day Wednesday. Accused said I must go and state all these things to Chattarsingh, *i. e.* all that had happened in this case. Then accused in presence of Krishnaji and Shankar and Keshav told me that he had taken the letter in connection with which Karandikar is being tried. After that I asked accused why did you not mention this up to this time. How is not mentioned your name up to this date. He said up to this date I remained quiet because up to this time the Police had not traced the addressee of the substituted article. He told me the name of the addressee. He said Shankar had given him a bottle of ring-worm ointment. And Shankar had

(1) (1873) 10 Bom. H. C. R. 300.

written the address and everything on the cover of the bottle. Shankar said to me I gave the phial to the accused telling him I had no money and he better post it himself at the Office. Accused said I then avoiding the eyes of the entry clerk substituted that article and Bezonji saw me substituting that article. After that the accused said he had brought the registered letter home. He said, the registered letter contained currency notes and Goa Lottery tickets. The accused said in the evening I opened the registered letter, burnt the envelope and the lottery tickets and took the notes. I then asked accused why he did not tell this to Shankar. And was he not afraid to substitute the ointment phial *i. e.* of being arrested. Accused said what is done is done. But if you can see any way for me to get out kindly find it out. Krishnaji was there at the time. He said why did you do so. Accused said I am not able to say why I did this or how I did it. I then advised the accused to confess. Now you have done this confess. His brother also gave him the same advice. Accused said Krishnaji says the same thing to me. This happened on Wednesday. Then on Thursday night accused said to us I intend to confess because if I confess I may get a lighter punishment. He said up to this time the Police or anybody else had only suspicion of me, but now that they have sent a wire to Banda the addressee might give the name of Shankar as the sender of the bottle because Shankar's maternal uncle had written to him to send such a bottle. His name is Kamat. I asked him particulars, I asked him where he got the receipt form for the substituted article. He said there was a receipt lying on the table of the entry clerk and on this very receipt I placed the substituted article. Then I asked him to account for the stamp impressions on the receipt.

Now it appears to me that there is no reason whatever why I should disbelieve witness Anant, who is a cousin of the accused, with regard to this evidence which he gives. In fact, he, as is shown in his cross-examination, was certainly not very favourable to the prosecution. In my opinion, I would not be justified in saying that the statements in the nature of confession made by accused to Anant were obtained in any way improperly and are not relevant and admissible according to law.

The next confessional statement is that deposed by Chattarsingh corroborated as it is by the witness Sabnis. That shows that on the Good Friday, the accused deliberately went with Anant and Krishnaji, his elder brother, to Chattarsingh at Dadar Plague Health Camp where he was then staying. There does not appear to me to have been any inducement, threat or promise made by Chattarsingh or any one else to induce the accused to make his statement to Chattarsingh, and I see no

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reason to disbelieve the latter when he says: "I told him (the accused) it was no use their coming to me but they should have gone to Hooper. Accused and his brother said that as I was their immediate superior they had come to me. I asked them to go with me to the Presidency Postmaster, Hooper. Those three men came with me. The two Patkis and I saw Hooper at the Post Office. He lives there." If we believe this evidence, then it is clear that Chattarsingh did not hold out any inducement, threat or promise in respect of these confessional statements. Chattarsingh further says and we really see no reason to disbelieve him that up to Good Friday he had never suspected the accused.

I then come to the Ex. B. Mr. Robertson for the accused laid great stress on the mention of Bezonji in that statement, and argued that inasmuch as Bezonji and Chattarsingh were on bad terms with each other, Bezonji's name was introduced at the instance of Chattarsingh; but if the witness Anant is believed it is evident that Bezonji's name was mentioned by the accused to him two days before the accused saw Chattarsingh on Good Friday, because Anant at page 15 says "Accused spoke to me the next day Wednesday . . . . Accused said I then avoiding the eyes of the entry clerk substituted that article and Bezonji saw me substituting that article." The inference I would draw from this is that the accused was desirous of excusing himself as much as possible by making it appear as if Bezonji his superior officer knew of his having taken this letter.

Another point which arises on the confessional statement to Anant and the Ex. B. is that it clearly appears in both of them that what really induced the accused to give himself up was that he was afraid that S. B. Kamat, the addressee of the parcel, which was sent to Banda, might disclose the name of the sender and the office of posting. I see no reason for holding that with regard to the statement as to the parcel sent to Banda any promise, threat or inducement was held out to the accused, and it appears to me clear for what purpose that parcel was used. It is proved that the No. 2316 which appears on Ex. D was taken from the receipt attached to the registered parcel addressed to Mr. Jones of the Ship Ollifanta by Sea Post. The name

Banda which appears on Ex. D was evidently taken from the address on the parcel which was sent to Banda (as the clerk Shantaram says) which was opportunely handed in to the accused on the morning when the registered article 477 disappeared. It is also clear why No. 227 was put on the parcel to Banda instead of 477; because if 477 had been put upon that parcel it would have been traced to Banda at once, and, when it was found to contain ringworm powder instead of notes and lottery tickets, the theft of 477 in Bombay would have been at once disclosed.

In my opinion, therefore, no good ground has been shown for impugning any of the confessional statements which were tendered against the accused, and which were evidently made with the object of the accused being as lightly dealt with as possible. The conviction must, therefore, stand. But accepting the views of my learned colleagues I think justice will be met if the sentence is reduced from one of six years' rigorous imprisonment to one of three years' rigorous imprisonment.

CHANDAVARKAR, J.—The first question is whether the writing, Ex. N, which contains the statements alleged to have been made by the witness Shankar to a police officer in the course of the investigation of this offence, was rightly admitted in and used as evidence. The terms of section 63[1] of the Bombay City Police Act, No. IV of 1902, which apply to such writing, provide in clear terms that such writing cannot be *used* as evidence, subject, however, to two exceptions, one mentioned in the proviso to the section and the other in clause (2) thereof. Clause (2) has no application here. The writing would be admissible in evidence, if at all, only under the terms of the proviso. But whether we

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(1) The section runs as follows:—63. (1) No statement made by any person to a police officer in the course of an investigation under this Act shall, if taken down in writing, be signed by the person making it nor shall such writing be used as evidence.

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872.

read the two parts, of which the proviso consists, conjunctively or distributively—a point on which it is unnecessary to express any opinion here—it is the statement contained in the writing which only could be used and that only to impeach the credit of such witness in manner provided by the Indian Evidence Act. But at the trial the writing, Ex. N, was used by the presiding Judge in his charge to the jury, not merely for the purpose of impeaching Shankar's credit, but also as evidence against the prisoner, because it contained statements made by Shankar to the police, corroborating the prisoner's confession. That use of the *writing* as evidence against the prisoner is opposed to the express terms of the section and must be held to have materially affected the deliberations of the jury in arriving at their verdict of guilty.

We must, therefore, exclude Ex. N from the evidence in the case and consider whether the evidence, which remains on the record after such exclusion, is sufficient to sustain the conviction.

It is conceded before us by the Crown that the evidence against the prisoner lies mainly in three confessional statements made by him on three different occasions—the first to his cousin, the second to Chattarsingh, and the third to Mr. Hooper. And the question is whether these confessions are proved to be true.

Mr. Robertson, the learned counsel, who has argued before us the case for the prisoner, has asked us to go into the preliminary question as to the admissibility in evidence of these confessions and to exclude them altogether from the record upon the ground that they are irrelevant under section 24 of the Indian Evidence Act.

On the other hand, for the Crown it is contended by Mr. Wadia that this question of the admissibility of the confessions in evidence is a point of law, which, not being included in the Advocate General's certificate given under section 25, we are precluded from considering by the terms of that section.

This contention is based upon an obvious fallacy. It assumes that every question relating to the admissibility of evidence is necessarily a point of law. The assumption seems to be based upon a misconception of the rule that it is the office of the

Judge to decide questions of law and of the jury to decide questions of fact. While that is no doubt the rule, it does not follow that every question which, according to law the Judge has to decide, is and must be a question of law, not a question of fact. As pointed out by the learned editor of Best on Evidence (8th edition, page 86), "that *matter of law* is distinguished from *matter of fact* in accordance with the different functions of *judge and jury, does not seem entirely accurate.* All questions of law (except, perhaps, to a limited extent, in criminal cases) are for the Court; all questions of fact are not for the jury..... so all facts preliminary to the admissibility of evidence are for the Court......So whether a confession is voluntary." And this is in accordance with the scheme of the Indian Evidence Act, according to which a confession is inadmissible, only if the Court considers it to have been induced by illegal pressure. Section 24 says it is not to be received in evidence if it *appears* to the Court to have been so induced. The word "appear" is important as importing judicial discretion. It shows that the Court has to decide the preliminary question of admissibility on a consideration of the evidence and surrounding circumstances. Where it so decides, the question decided is a question of fact. If, of course, upon the evidence as it stands—taking the evidence to be credible and apart *from any question of* the weight to be attached to it—any question of the admissibility of the confession arises in point of law, it is otherwise. That was the case in *Reg.* v. *Navroji Dadabhai*[1]. There the Full Bench did not weigh the evidence relating to the confession but accepting it as credible went into two pure questions of law—first whether Wainwright was a person in authority and whether the words he uttered amounted in law to an inducement. So also a Court's power to admit secondary evidence under Chapter V of the Evidence Act. Whether secondary evidence is admissible or not has to be decided on evidence and its decision is a question of fact—not of law—one of which the Privy Council say that it is proper to be decided by the judge of first instance, depending very much on

(1) (1872) 9 Bom. H. C. R. 358.

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his discretion and their Lordships hold that "his conclusion should not be overruled except in a very clear case of miscarriage." *Srimati Rani Hurripria* v. *Rukmini Debi*[1].

The question, therefore, whether the confessions of the prisoner were admissible under section 24 of the Evidence Act, had to be decided by the learned judge who presided at the trial, on his appreciation of the evidence relating to it as a preliminary and collateral question. And he decided it as a question of fact, holding in effect that the evidence did not *appear* to him to justify the exclusion of the confessions upon any of the grounds specified in section 24. In so deciding he exercised the discretionary power vested in him by the terms of the section: there is no point of law; and the simple question before us is, not whether we, acting as a Court of Reference and Review under section 26 of the Letters Patent have power to revise that exercise, but whether, assuming for the sake of argument that we have that power, such a case is made out as ought to be made out before a Court of Review and Reference interferes with the discretion of a lower Court. It is upon that narrower ground that the point now under discussion must and can be disposed of and it is not necessary to decide the broader question raised—whether we have jurisdiction under clause 26 of the Letters Patent to decide any other *point of law* than that contained in the Advocate-General's certificate. I say it is not necessary and I decline to consider it because there is no point of law as such about the admissibility of the confession before us. The point raised turns on disputed *facts*. The nature and character of the power which a Court trying a criminal case exercises in admitting in or excluding from evidence a confession under section 24 of the Evidence Act is described by West, J., in the judgment of this Court in *Queen-Empress* v. *Vijialakshmi*[2], as discretionary. "It was a discretion," said West, J., "which was left to the Court to which the evidence was tendered, and it was only in the exceptional case when the Court above had reason to believe that the practice had been obviously abused, and that there had been an entire want of discretion in receiving

(1) (1892) I. L. R. 19 I. A. 73 at p. 81. (2) (1881) Unrep. Cr. C. 163, 164.

the confession, that they could interfere." No such case is made out before us—none is even suggested by the learned counsel for the prisoner. His argument is in effect merely that the presiding Judge misappreciated the evidence on the question of admissibility and wrongly exercised his discretion. That is not enough to justify our interference with that discretion. There is no law about it. In this opinion I am further fortified by the decision of the Privy Council already cited.

The confessions, therefore, cannot be *excluded* from the evidence in the case. We must consider them and assess their *value* as evidence properly admitted to see whether they are true confessions. What the presiding Judge at the trial had to decide in the exercise of his judicial discretion was whether the confessions appeared to him to be *voluntary* and he has so decided. What we have to decide is, are they proved to be *true?* No doubt in assessing the value of a confession as sufficient evidence and finding out whether it is true or false, various considerations do and must enter, of which one may be and generally is whether it was voluntary or not. But the question as to its voluntariness comes in there only as a subordinate, though material element in the main question of the credibility of the proof. And hence the rule of law stated by Mr. Taylor in his work on Evidence (paragraph 791*) that "deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law." So it has been ruled in the American Courts that after the Court has ruled that the confession is admissible, the accused may ask to have the jury disregard it if they think it not voluntary: *Income* v. *Culver*[1].

Thus approaching the question of appreciation of the evidence which remains after excluding Exhibit N, I have no reasonable doubt as to the guilt of the prisoner. His first confession was to his cousin Anant whose evidence-in-chief is marked by coherence of statement and has not been in the slightest degree shaken in cross-examination. The only thing suggested against him is that he is a subordinate of Chattarsingh and that to please

* [Paragraph 865, in the Tenth Edition.—ED.]
(1) 126 Mass. 464.

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the latter, Anant and some other members of the family arranged that the prisoner should concoct a story implicating himself in the crime. The suggestion is more or less speculative and is not sufficient to meet the positive sworn testimony of Anant himself. The next confession was to Chattarsingh and it is corroborated by the independent testimony of Sabnis, who is a disinterested witness except that, it is suggested he is a friend of Chattarsingh. It is a mere suggestion as to which he was not even cross-examined. As to the last confession, that made to Hooper, some portions of it have been commented upon by Mr. Robertson by the light of the evidence adduced for the prosecution relating to Bezonji's alleged complicity in the crime. The evidence as to Bezonji may or may not be true. If, as is urged for him, the prisoner confessed merely to inculpate Bezonji, the question still remains why should he have inculpated himself? The prisoner is not illiterate. He knows English. He must have known the consequences. And then the Banda incident is, in my opinion, decisive of the truth of the confessions and the prisoner's complicity. The facts as to it, appearing in the evidence, stand unchallenged and uncontradicted. The prisoner is a native of Banda. His friend Shankar has a friend in one Kamat at Banda. On the morning of this crime, Shankar gave to the prisoner a bottle containing ring-worm powder to be sent by post—not registered post—to Kamat at Banda. That article came to have a false number and was despatched by registered post as having come from Colaba, though it had been delivered by Shankar to the prisoner at the General Post Office. It is that article which was substituted for the missing article bearing No. 477. These facts stand out in the case uncontradicted and the coincidence between them and the missing of the article bearing No. 477 is striking, in point of time, place and circumstance. I pointedly asked Mr. Robertson for some explanation of the coincidence consistent with the theory of the prisoner's innocence but it is at that crucial point that Mr. Robertson's argument failed. He could suggest no satisfactory explanation. Upon the whole, I am of opinion that the evidence on the record after the exclusion of Exhibit N is sufficient to support the conviction, and I would affirm

it. But having regard to all the circumstances of the case especially to the impression generally conveyed by the evidence that the crime could not have been committed by the prisoner without the aid and complicity of some others in the Post Office and that it is not quite clear whether he was not a tool in the hands of those others I would reduce the sentence to three years' rigorous imprisonment, which cannot err either on the side of undue severity or undue leniency.

BATTY, J.—I concur in the results of the two judgments which have just been delivered. I concur in thinking that the writing to which the statement of *the witness* was reduced, could not be used as substantive evidence against the *accused*. No doubt it might have been used for the purpose of refreshing the memory of the witness cross-examined as to the fact of the statement either on behalf of the prosecution or on behalf of the defence, provided that it was treated by the prosecution only for the purpose of impeaching the credit or in corroboration of the witness who made it.

I do not think that it is necessary to discuss the question of the powers and duties of this Court, acting under clause 26 of the Letters Patent. In the first place it does not appear to me that any objection has been taken as to the direction of a point of law by the presiding Judge as to the confession of the accused. Section 24 of the Evidence Act requires that a confession is to be treated as irrelevant if it appears to the Court to have been caused by any inducement, threat, or promise, etc. The Judge did not give any direction opposed to that principle of law, but only held that as a matter of fact the confession did not appear to have been improperly induced within the meaning of that section. The decision, therefore, with regard to the relevancy of that confession appears to me to be entirely one of fact and has no connection with legal principles laid down in section 24, the operation of which is not attracted by the facts found. If it were necessary to consider the effect of that confession, I think that there could be no doubt that the evidence was very far from establishing that any inducement was given by Chattarsingh to obtain the confession that was made. The

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arguments which have been addressed to us no doubt indicate enmity between Chattarsingh and Bezonji, and this might account for the action of Chattarsingh and possibly of the accused in introducing the name of Bezonji into the confession. But the enmity to Bezonji affords no explanation of the motive for the confession itself. It is not sufficient to render a confession irrelevant under section 24 that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced. So far as I have been able to see from the evidence, there was no reason why Chattarsingh should have induced or ground for supposing he would have been able to induce the accused rather than any other of his subordinates to make a confession of a crime.

I also concur in the proposed reduction of the sentence.

DAVAR, J.—In July 1906 the accused Narayan Raghunath Patki was, at a trial held at the Criminal Sessions of the High Court, convicted of the offence of having committed theft of a Registered letter and sentenced under section 52 of Act VI of 1898 to suffer rigorous imprisonment for six years.

On the 16th of October 1906, the acting Advocate-General certified that in his judgment the statement of Shanker, a witness for the prosecution, taken down by one Narayenrao, a Police Officer, was wrongly admitted in evidence and that there was "accordingly *an error* in the decision of *a point* of law decided by the said learned Judge."

On the certificate of the acting Advocate-General the case came on before us in this Court. It appears that Shanker's statement to Narayenrao was not only admitted in evidence but was *used* as evidence against the accused. We are unanimously of opinion that this statement was not evidence against the accused and must be eliminated from our consideration in judging of the guilt or innocence of the accused. It is therefore unnecessary for me to discuss this question further.

Under clause 26 of the Letters Patent on the above certificate being granted this Court has "full power and authority to

review the case, or such part of it as may be necessary and finally determine *such point* or *points* of law and thereupon to alter the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right."

Having decided the point covered by the certificate in favour of the accused it becomes necessary for this Court to consider whether the sentence passed on the accused should or should not be set aside or altered. Clause 26 confers no power on this Court to order a fresh or new trial and therefore we have to look to section 167 of the Evidence Act—which has been held to apply to criminal trials—for guidance as to the further course to be pursued by this Court. That section says that we are not to reverse the decision in any case in which evidence is improperly admitted if it shall appear to the Court that independently of the evidence objected to there is *sufficient evidence* to justify the decision.

Mr. Robertson, who appeared for the accused and argued the case most ably for him, has contended before us that independently of Exhibit B, which is the confession of the accused made before Mr. Hooper the Presidency Post Master, there is no evidence to justify a conviction. As to the confession he contended that it was manifestly untrue, that it was obtained by inducements, threats and promises, and that the learned acting Chief Justice who presided at the trial was in error in admitting it as evidence against the accused. He asked us to eliminate the confession from our consideration and to hold that it was improperly admitted in evidence at the trial of the accused.

It must here be noted that this question of the admissibility of the accused's confession was most fully and elaborately argued and the learned Judge who tried the case did not decide the question of its admissibility till he had heard the whole of the evidence and given counsel for the accused all opportunities to satisfy him that it was improperly obtained and was therefore inadmissible. He decided this question against the accused. No application was made to the Court originally trying the accused to reserve the question, as to whether the confession was legally

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admissible in evidence against the accused, as provided by clause 25 of the Amended Letters Patent. There is no certificate before us from the Advocate General that the admission of the confession was in his opinion an error of law on the part of the learned Judge. It is now before us as a piece of evidence. Is it open to us now to go into the question of its admissibility? Mr. Robertson argues that we are empowered to review the case and therefore it is open to us to go into the question and decide for ourselves whether the confession is relevant under section 24 of the Evidence Act, and he has placed before us a minute analysis of the evidence to show that it was improperly obtained. I am of opinion that in the absence of any reservation of this point under clause 25 or any certificate from the Advocate General under clause 26 of the Amended Letters Patent we are precluded from reopening the question which was decided by the learned Judge presiding at the trial. The words "review the case" in clause 26 must in my opinion be read with the words that follow, *viz.*, "or such part of it as may be necessary and finally determine *such* point or points of law". Under clause 26 it seems to me that we are at liberty to review the case or part of the case for the purpose of determining the point or points of law that are either reserved for our opinion or are certified by the Advocate General to be wrongly decided. Then again under section 167 of the Evidence Act all that we have to do after rejecting the piece of evidence complained of as being improperly admitted is to see if there is "sufficient evidence" to justify the decision. This confession is *evidence* recorded in the case. Its admissibility has been adjudicated upon. We are not a Court of appeal in the ordinary sense of the term. I do not think it is open to us under the present circumstances to go behind the record of the case, scrutinize every piece of evidence, and enter upon an elaborate investigation as to whether each particular piece of evidence recorded by the learned Judge and to which the accused's counsel *now* takes exception was or was not rightly recorded. Such a course does not appear to be intended to be followed by clause 26 of the Letters Patent and there is nothing in section 167 of the Evidence Act to justify such a procedure.

In support of his contention on this point the learned counsel for the accused has cited before us five cases, namely, *Reg.* v. *Navroji Dadabhai*[1]; *Imperatrix* v. *Pitamber Jina*[2]; *Queen* v. *Hurribole Chunder Ghose*[3]; *Queen-Empress* v. *O'Hara*[4]; *Subrahmania Ayyar* v. *King-Emperor*[5].

I have read all these cases and carefully considered them. I do not find anything in them to alter the views I have expressed on this point.

In the case of *Reg.* v. *Navroji Dadabhai*[6], the accused Navroji, a travelling auditor in the service of the G. I. P. Railway, was with another man charged with having committed criminal breach of trust in respect of *two* sums of money and they were both charged with aiding and abetting each other in the commission of the two offences. Navroji was convicted of both the offences and at the instance of his counsel a question was reserved as to whether one of the exhibits in the case was properly admitted in evidence. That exhibit had reference to only one of the charges. The principal question argued was whether the words used by Mr. Wainwright which led to the accused writing out a receipt which was the exhibit alleged to be improperly admitted were such as to constitute an inducement and whether the person using the words was a person in authority within the meaning of section 24 of the Evidence Act. The Court consisting of Sargent, C. J., and Bayley and Green, JJ., came to the conclusion unanimously that the exhibit was improperly admitted. The Chief Justice and Mr Justice Green held that the Court had power to review the whole case and on a review of the whole case they came to the conclusion that the exhibit did not touch the second head of the case and they affirmed the conviction on the second head. Mr. Justice Bayley dissented and entered his strenuous protest against the assumption of such powers. He was of opinion that the conviction and sentence should be quashed. Now although the Court in this case by a majority of two to one went into a review of the whole case, they reviewed the same as a whole as it was

(1) (1872) 9 Bom. H. C. R. 358, 376.
(2) (1877) 2 Bom. 61.
(3) (1876) 1 Cal 207.
(4) (1890) 17 Cal. 642.
(5) (1901) 25 Mad. 61, 74.
(6) (1872) 9 Bom. H. C. R. 358.

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placed before the jury in the Sessions Court. There was no question here of excluding any portion of the evidence recorded in the case except the exhibit in respect of which the point was reserved. The Court did not go into the question of relevancy or admissibility of the evidence which remained after eliminating Exhibit E which was held to be improperly admitted. The question which arises in this case never arose in that case. I have carefully considered the passages read to us from Sir Charles Sargent's judgment by Mr. Robertson. I find nothing in them which is inconsistent with the view I take in this case. I grant that we must review the whole case and judge for ourselves whether on the evidence that

page Mr. Justice Pontifex speaks of "*admissible evidence in this case.*" A careful study of the judgments however leaves no doubt whatever on my mind that both the learned Judges are here referring to the remaining evidence in the case after excluding the evidence which they held to have been *improperly received* and *not admissible in the case.*

The expressions are used to distinguish the unchallenged evidence that remained from the evidence that was excluded. No question whatever here arose as to rejecting or excluding any other evidence except the confession in respect of which there was a certificate.

The next case, *Queen-Empress* v. *O'Hara*[1], was a case of misdirection to the jury. Mr. Robertson has not drawn our attention to any particular passage in the judgment on which he relies, and after perusing the case with attention I fail to find anything in it that supports his contention. The only passage in the judgment of the Chief Justice Sir Comer Petheram which can have any bearing on this point is at page 667 where he says:—"In the view we take of the case, it is unnecessary to deal with the argument for the prosecution as to the powers of the Court acting under section 26 of the Charter. We take it to be clear that in a case of misdirection such as this, and of improper reception of evidence such as took place in the present case, this Court may and ought to exercise its powers of review." This proposition has not been challenged and I have failed to find anything in the case that lends any support to the contentions of the learned counsel for the accused

The last case relied on by the learned counsel for the accused is the case of *Subrahmania Ayyar* v. *King-Emperor*[2]. This was a case of misjoinder of charges and the Privy Council held that the trial having been conducted in a manner prohibited by law was altogether illegal and the conviction was set aside. Mr. Robertson read to us passages in the judgment of Sir Arnold White at page 74. This case is of use only in so far as all the other cases discussed above are referred to and discussed by the Chief Justice. In this case again no question

(1) (1890) 17 Cal. 642. (2) (1901) 25 Mad. 61.

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ever arose about the Court's power to go into questions of law other than those reserved or certified, or of excluding evidence which appeared on the record.

In addition to the cases cited by the learned Counsel for the accused I have gone through the notes of a judgment delivered by a Full Bench of this Court on the 17th of April 1903. In this case *Emperor* v. *Leherchund and others*[1], the principal point complained of and in respect of which the Advocate General's certificate was obtained was the improper admission of evidence which was let in as admissible under section 10 of the Evidence Act. Having decided that the evidence in respect of which the Advocate General had certified *was* improperly admitted the Court says:—"For the Court to deal with the case *de novo* no doubt transfers from the jury to the Court the determination of the question whether the *legal evidence* in the case is sufficient to support a conviction." A careful study of the notes of judgment leaves no doubt whatever in my mind that the words "legal evidence" are used only to distinguish the evidence that remained after excluding the evidence *illegally* admitted in respect of which there was a certificate from the Advocate General. That this is so appears from the latter part of the notes where, after discussing the remaining evidence it is stated: "We have come to this conclusion solely on the evidence with which we have dealt and excluding the evidence of several accomplices, the statements of Nemchand and all relating to the alleged accomplices." In this case also there never was a question raised for the exclusion of any evidence in addition to that which the Advocate General had certified to have been wrongly admitted.

In discussing all these cases I have specially picked out of them everything I can find that is most favourable to the contentions put forward on behalf of the accused and then anxiously considered the same. I can find nothing in them to justify our following the course so strenuously fought for by Mr. Robertson.

To sum up shortly my views of this question, I hold that the question of the admissibility or otherwise of the accused's con-

(1) Unreported.

fession (Exhibit B) was a question which the learned Judge who presided at the trial had to decide. After hearing arguments of counsel he pronounced his judgment on the question and admitted it in evidence. The accused's counsel did not ask for a reservation of this point for the opinion of the High Court. The acting Advocate General refers only to one exhibit and leaves the confession untouched. Under the circumstances I am of opinion that it is not open to us at this stage to go into the recorded evidence for the purpose of finding whether the confession was properly admitted. It is on the record. It is before us as part of the evidence against the accused. I hold that we have no power to exclude it altogether from our consideration.

Although before now I was aware of the views of my learned colleagues who have preceded me in delivering their judgments on this point I had no opportunity of considering the reasons which are now given by my learned colleagues Messrs. Justice Chandavarkar and Batty. I have followed them with great attention, more especially the very elaborate reasoning of Mr. Justice Chandavarkar. I regret to say I am still unconvinced and it is a matter of great regret to me that I am not in accord with three of my colleagues on the Bench. It is, however, a source of satisfaction to me to know that at least one of my colleagues is in entire accord with the view I have taken of this question.

This finding of mine necessitates the consideration of the questions whether the confession of the accused so far as it relates to his own guilt is true or false? What is the weight to be attached to it? And is it by itself or coupled with the other evidence in the case sufficient to support the conviction?

Before, however, discussing these questions it would be as well to say here that having heard arguments fully on both sides and perused the evidence if I had to pronounce an opinion on the question as to whether the confession was *properly admitted* I would say that in my view of the evidence the confession was rightly admitted in evidence by the learned Judge at the trial. I am of opinion that the confession was not obtained either by threat, inducement, or promise of any kind.

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The question to be now considered is: Having excluded the piece of evidence covered by the certificate of the acting Advocate General is there sufficient evidence before us to support the conviction? In my opinion there is.

It is clearly established by the evidence that a registered article numbered 477 came from Ahmedabad to Bombay on the 9th of December 1905. It disappeared and has never been found again. A registered article bearing number 277 purporting to come from Colaba was delivered to one Sitaram Kamat at Banda in the Sáwantvádi District. The article was a bottle of ringworm powder which would not ordinarily be sent by registered post. It is proved that no parcel bearing No. 227 came from Colaba. The witness Dwarkanath, who has been for fifteen years in the Post Office, was entrusted with the investigation of this matter and he has given evidence after what appears to me to have been a very exhaustive and laborious inquiry. He sums up the result of his labour as follows :—

"I say 477 was received on the 9th of December. 277 was despatched from the General Post Office on the 9th December. I have examined the total number of receipts of articles sent out to *all parts of the world* on the 9th December and the total number of articles despatched. I found the number did not tally. I found so many received and so many despatched. The receipt and despatch of all letters tallies. *227 took the place of 477.*" (See printed book, p. 30)

The Post Office authorities made inquiries as to Registered parcel bearing No 227 of Sitaram Kamat the addressee. He declined to give any information as to the sender. He said he was unable to furnish particulars of the sender's name and address. This was in April 1906 This statement of his appears to me to be manifestly untrue and lends force to the other evidence in the case that the accused and his friends had put pressure on this man to withhold all information from the Post Office. Now about this time a fellow clerk of the accused named Karandikar was being prosecuted by the Post Office authorities in the Police Court on the charge of stealing this very packet No, 477. Sitaram Kamat, the recipient of the Parcel numbered

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227, was subpœnaed to give evidence in that case. It was easy for him to have pleaded forgetfulness when questioned by a Post Office official. It would not be so easy for him when giving evidence on oath to pretend that he could not give the name and address of the sender of a Registered parcel received by him only four months before the date when he was called upon to give evidence. The accused knew this. He knew that an innocent man was being prosecuted for this offence. At the next hearing of the case against Karandikar which I believe was on the day following the day on which he confessed, the Banda man Sitaram would be examined and then facts would transpire which would point to him as the real culprit. In Exhibit B his confession made before Mr. Hooper, the Presidency Post Master, he says:—

"I heard yesterday that the addressee had been summoned by the Police to give evidence in Court in the case now proceeding against Mr. P. W. Karandikar and fearing that the truth would leak out I confessed the whole matter to my brother K. R. Patki who thought it best to bring me before you to make a full statement of the case."

In this passage the accused gives, to my mind, a correct version of the circumstances under which he first went to Mr. Chattarsingh and subsequently to Mr. Hooper.

It is argued before us that the confession is false and was made under threats used by Mr. Chattarsingh and under promises held by him and that it was obtained by him for the purpose of ruining one Bezonji with whom Mr. Chattarsingh had been on hostile terms. In the view I have taken it is not open to me to go into question of threats, inducements, or promises, but it is open to this Court to find out whether the confession is true or false so far as it relates to the accused's own guilt and to consider what weight should be attached to it.

In the confession made before Mr. Hooper on the 18th of April 1906 the accused makes a clear admission of his own guilt and tries to implicate a superior officer named Bezonji. The confession may or may not be false as regards Bezonji. On the evidence I am of opinion that it is false as regards Bezonji's

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complicity. The motive in doing this is not far to seek. It is the usual practice of criminals, when they find that they could not conceal their own guilt and are driven to make a confession in the hope of getting off lightly, to try and inculpate some body else in order to minimise their own guilt. It seems to me to be the same here. He says he stole the letter—opened it at home—found Rs. 80 in it—brought the whole of this money to Bezonji who asked him to retain Rs. 30 for himself out of it. He goes on to say that he refused to accept the same but Bezonji compelled him to take this sum under threats. From this I have no doubt in my mind that the accused while driven to make a confession was making despaiate attempt to appear the victim of somebody else's instigation and to show that he did not steal the letter with a view to take the contents for himself.

Then again look at the circumstances surrounding the making of the confession. The accused when he goes to make his confession is accompanied by his elder brother Krishnaji and his cousin Anant. They tell Mr. Chattarsingh what they had come to him for and he takes them to Mr. Hooper. The making of the confession was not the result of a rash impulse or sudden threat leaving no time for consideration. This step seems clearly to have been decided upon after consideration and consultation with his relations and friends and it is to my mind utterly inconceivable that if the confession was false that those relations who were advising the accused and were present when he made the incriminating statement in the first instance to Chattarsingh would ever have allowed the accused to make those statements. Krishnaji and Anant were present when the accused made his statement to Chattarsingh. Krishnaji was present when Mr. Hooper took down the accused's statement. As I said it is hardly possible to conceive that under the circumstances the accused would make a false statement incriminating himself.

The conclusion I have come to is that the confession so far as it relates to the accused's own guilt is true. It is an important piece of evidence. Coupled with the other evidence in the case I find that the accused is guilty of the offence with which he is charged. I would like here to record my appreciation of the very careful analysis of the evidence presented to us by

Mr. Wadia for the Crown and I feel indebted to both counsel for the Crown and the accused for the very able manner in which they have assisted the Court in putting before us the case each from his own point of view.

The learned acting Chief Justice on a reconsideration of the whole case is inclined to reduce the sentence which he pronounced on the accused. We have the power to alter the sentence and in *Leherchund's* case we have precedent where, while affirming the conviction, the Court reduced the sentence.

I agree with my learned colleagues that having regard to all the circumstances of the case a sentence of three years's rigorous imprisonment would be adequate punishment to the accused.

BEAMAN, J.—Exhibit N, a written statement made by witness Shankar to Policeman Narayenrao, has been certified by the Advocate General to have been wrongly admitted. On this point this Full Bench appears to be agreed, that the writing was, at any rate, wrongly used. But from much that has fallen from my learned colleagues I feel some doubt whether our agreement is as complete as it seems upon what is really of the first importance, namely, the true scope and intention of section 162 of the Criminal Procedure Code.

There is an obvious difference in the first place between the *improper admission, and the improper use after admission of* any piece of evidence. I understand that the first question raised by the Advocate General's certificate is whether the impugned evidence was wrongly admitted and I gather from some passages in the judgments which have been delivered by my learned colleagues that while the use of the writing itself as substantive evidence against the accused was clearly and certainly wrong, it is by no means so clear in the opinion of some of them, that the statement, that is to say, the contents of the writing, might not have been quite properly used, if proved, sentence by sentence by the policeman who recorded it, against the prisoner.

And I take it that that view rests upon a distinction between the "writing" and the "statement" which is embodied in the writing.

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With all respect and deference to my learned and honourable colleagues I think that that distinction is a distinction of form rather than of substance. If the "statement" might properly be admitted and used to contradict the prosecution witness who made it, as under the general rule of evidence it undoubtedly could, then I see no reason in principle why that statement should not be provable in the usual way and by the best evidence of it, namely, the written record of it. True, in the body of the section, the use of the writing as evidence, is expressly prohibited—while in the proviso "such statement" is permitted to be used for a limited purpose The important point is not however the distinction between the "statement" and "writing" (though of course there is a distinction) but the extremely restricted use to which even the statement may, under the section, in contradistinction to the general law, be put. The section plainly constitutes an exception to the ordinary rule of evidence. The proviso again engrafts an exception upon the exception. And in giving effect to the section and the proviso together it is necessary to keep carefully in sight what the Legislature really means. About this the language and the policy of the section, combined, leave, I think, no reasonable doubt. Before the last amendment, statements made by witnesses to the Police, and recorded by the Police might not be used as evidence against the accused. But there was nothing to prevent them being used in favour of the accused. They were often so valuable for that purpose, that in almost every case, the accused sought to know what they contained, with the object of using them if suitable, to his own advantage. In order to curtail to some extent that liberty, the section was amended in its present form. The effect of the amendment is to restrict the privilege of the accused. He can now only obtain access to written statements made by prosecution witnesses to the police, at the discretion of the Court. It is no longer a matter of right.

The proviso is clearly limited to the purpose of this single concession, in derogation of the universal prohibition contained in the body of the section, to the accused. This is so plain on the face of the section and proviso, that I should have thought there could have been no doubt about it. The proviso deals with

one case and one case only, the case of witnesses "called for the prosecution" whose statements have been taken down "in writing as aforesaid". And the only concession it makes to the accused is to allow him, upon his request, and subject to the Court's discretion, to have access to a "copy thereof", namely, of the recorded statement, and thereupon to use it for one purpose and one purpose only, namely, to break down the evidence of the prosecution witness already standing against him. On the face of it the proviso does not cover the case of a witness for the defence, whose statement may have been recorded by a policeman, nor allows the prosecution to impeach the credit of such a witness by examining him upon any written statements he may have made to the police. *A fortiori* the proviso could never have been intended (and I think that its terms are plain enough to the contrary) to allow the prosecution to impeach the credit of its own witnesses for its own purposes, and against the wish of the accused, by reference to police testimony. That view presents, on the face of it, these two startling difficulties. (1) That the Legislature has in this important matter given the prosecution a marked advantage over the accused. And this is opposed to the first principles of our criminal jurisprudence. (2) That in effect it works out to this, that the prosecution would be empowered indirectly and under the pretence of shaking the credit of its own witnesses, to substitute in the record, as evidence against the accused person, not what those witnesses have said on oath at the trial but what they have said or may have said in circumstances altogether unknown and uncontrolled, to its own police officers. That is in fact what has happened in this case, and underlies, as I understand, the Advocate General's certified objection to Shankar's statement to Narayenrao. I think it too plain to need further argument that if the prosecution is precluded from using these statements to impeach the credit of witnesses for the defence, it is for much better reasons precluded from using them to impeach the credit of its own witnesses. Nor indeed is that in any case the real object, though it may be plausibly advanced as the nominal object which the prosecution has in view, when it seeks this indulgence. For *ex hypothesi*, when a Crown witness has said nothing

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against the accused no question of impeaching his credit properly arises. The only person interested in shaking the credit of a witness is the person against whom he has said something. What has really happened is this. A witness, who has said things to the police, which the prosecution strongly relies on, refuses at the trial to repeat those things. The prosecution, pretending to wish to impeach his credit, then tries to bring on the record through the police officer, all that matter upon which it intended to rely, not of course to contradict the witness, but as substantive evidence. It wants in other words to substitute for what the witness has said at the trial, what it believes he ought to have said. Apart then from the use to which Exhibit N was put on this occasion I go further, I think, than any of my learned colleagues and say that it ought not to have been admitted at all, or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting Shankar.

While then I agree in the main on this point with my brother Chandavarkar the whole of whose ably reasoned and most instructive judgment commands my admiration, I have not shrunk from pursuing my reasons to their logical conclusion notwithstanding that conclusion and those reasons need not perhaps have been thus amplified for the narrow question first to be answered. As to the writing itself being inadmissible, and as to its having been wrongly admitted and treated as evidence, there can of course be no room for doubt or difficulty. On the second point, while I have not for a moment been blind to the difficulty of separating precisely what is, from what is not, a point of law in questions about the admissibility of evidence, I have never entertained any serious doubt that for practical purposes, as well as upon sound principle, I should wish to stand upon the firm and simple grounds admirably and convincingly stated in the judgment of my brother Davar. It is of course extremely easy to embroider that or any other principle with subtle distinctions; but I feel that there ought to be a clear rule of practice, easy to understand and plain to follow. I do not think I can add anything with advantage to what has been said by Mr. Justice Davar on this head. I think that where the

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Advocate General has certified a particular piece or pieces of evidence to have been wrongly admitted, the Court of Reference constituted under clause 26 of the Charter has first to determine whether or not the certificate is well founded, and if it decides that it is, then to deal with what remains of the evidence, after striking out what has thus been adjudged not to be evidence. I do not feel much difficulty over the objections raised upon certain phrases in the cases, where the learned Judges say that after having disposed of questions affecting the admissibility of challenged and certified pieces of evidence in favour of the party objecting, the Court must proceed to deal with the rest of the "legal" or "admissible" evidence. My brother Davar has dealt with this sufficiently and I entirely agree with him. I think, too, the short answer to another class of objections turning upon the power of the Court of Reference to decide all over again whether any and every word of the evidence is "legal," that is to say, has been rightly admitted and is relevant, is this. Presumably it has been objected to by the party applying for the certificate or it has not. If it has, and the Advocate General has refused to certify that in his opinion it was wrongly admitted, then there are two opinions, his and that of the trying Judge in favour of the admissibility of the evidence. And I apprehend that that is and was intended to be enough. If the party did not object, did not ask for a certificate in respect to evidence which is thus challenged for the first time after the trial, at the hearing before the Court of Reference, the objection comes too late. I should also wish to acknowledge the force of my brother Chandavarkar's reasoning upon this point, and the salutariness and prudence of his conclusion. The point is important in itself, and had this direct bearing on the decision of the case that had it been, as I was all along of opinion that it was not, open to us to decide for ourselves whether the confessions ought to have been admitted, I doubted, looking to all the reasons and considerations most ably and exhaustively advanced by Mr. Robertson for the prisoner, whether section 24 of the Evidence Act might not have shut them out. Towards the close of the argument, however, I gathered that all my learned colleagues believed that the confessions had been

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voluntarily made. I should not have pressed the contrary opinion, in those circumstances, had I after fully weighing all that was to be said on both sides been inclined for my own part towards that opinion. I feel that I ought, speaking for myself, to express my great indebtedness to the learned counsel on both sides. To the length the Court wished him to go Mr. Wadia stated the prosecution case with remarkable clearness and mastery of all its complex details, and had my opinion been more generally shared, and had it therefore been considered desirable to hear a more elaborate refutation of Mr. Robertson's argument against the admissibility of the confessions, it is quite possible that the prosecution had materials which in the able hands of the counsel representing the Crown would have completely dispelled my doubt. On the other side no single point that could and ought to have been pressed for the accused was omitted by Mr. Robertson whose powerful arguments greatly impressed me. I agree with my learned colleagues in the order proposed.

[*Statement of witness excluded from evidence: conviction approved: sentence reduced to three years' rigorous imprisonment.*]

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1907. *June 27.*

GANGABAI (PLAINTIFF) v PURSHOTAM ATMARAM (DEFENDANT) *

Easement—Ancient Lights—Injunction to restrain defendant from interfering with ancient lights—Quia timet *action, necessary ingredients for.*

There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will, if it comes, be very substantial.

Fletcher v. *Bealey*(1) followed.

* Original Suit No. 783 of 1906.

(1) (1885) 28 Ch. D. 688.

THE facts of this case appear sufficiently from the judgment.

Bahadurji (*Padsha* with him), for plaintiff.

Jinnah and *Mazumdar*, for defendant.

MACLEOD, J.:—The plaintiff is the owner of a house in Vithalvádi and sues the defendant, the owner of a house abutting the eastern wall of the plaintiff's house, for a declaration that certain windows in that wall are ancient lights and for an injunction to restrain the defendant from interfering with them. It appears that one Nowroji Kapadia, the plaintiff's agent, in October 1906 received information which led him to suppose that the defendant was going to pull down his house and erect a new one with a ground floor and three upper stories; whereupon he instructed plaintiff's solicitor to write a notice to the defendant on the 30th October, warning him against building so as to infringe the plaintiff's rights To this the defendant made no reply and in my opinion no reply was called for. At that time the defendant's house was as it is shown in red in the plan annexed to the plaint now Exhibit C. On the north side of his house the roof sloped down so as to meet plaintiff's wall just below window No. 1 and at the south side there was a terrace which reached that wall a few feet lower down. After the letter of the 30th October, Nowroji noticed that the defendant appeared to be making additions to his building, new posts were being erected and that part of the roof which sloped towards the plaintiff's house was being removed. Without further notice this suit was filed on the 18th December and an *interim* injunction was obtained on the 20th December, the argument of which by consent has stood over till the hearing. The defendant admits that the plaintiff's windows are ancient lights but asserts that when the suit was filed he had no intention of raising his house so as to interfere with them. The action is a *quia timet* action to restrain an apprehended injury, and to maintain this the plaintiff must prove imminent danger of a substantial kind and that the apprehended damage, if it does come, will be irreparable. In *Fletcher* v. *Bealey*[1] Pearson, J., at

(1) (1885) 28 Ch. D. 688.

page 698, said: "I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

On these points the plaintiff's case depends practically on the evidence of Nowroji. He says he heard from one Nagarchand Chaganchand, the partner, and one Dorabji, the mistry of Fakirchand Motichand, the owner of the house to the north of the defendant's house, that defendant was intending to build a house of three stories on the site of his old house. Now, Fakirchand, or probably his father (as he was only a boy), was building to the north of the defendant and wanted permission to enter defendant's premises so as to plaster his new south wall which abutted on the defendant's house. For this purpose both Nagarchand and Dorabji approached the defendant. Nagarchand says defendant told him he (defendant) was going to raise his house higher than Fakirchand's and therefore there was no necessity for Fakirchand to plaster his wall. Dorabji says when he went to ask defendant's permission defendant put him off on various pretexts and on the last occasion said he was going to raise his house higher than Fakirchand's. Both witnesses admit that there had been disputes between Fakirchand and the defendant owing to defendant complaining that his house had been damaged by Fakirchand's new building, which would be quite sufficient reason for defendant not wishing to grant Fakirchand any facilities for plastering his wall. Defendant says he never said anything about raising his own house as he had no such intention at that time. I am satisfied that it is more probable

that he is speaking the truth than the plaintiff's witnesses. Even supposing he had said something to this effect to Nagarchand and Dorabji I do not think the plaintiff would have been entitled to rush into Court without at the very least taking further steps to ascertain (1) whether defendant had actually said what was imputed to him; (2) whether such intention, if given effect to, would inevitably cause an interference with the plaintiff's rights. We have, however, further corroboration of the truth of defendant's story from facts the plaintiff discovered after the suit had been filed. Exhibit H is a file of papers produced from the office of the Executive Engineer to the Municipality which relates to an application made by the defendant in September 1905 for permission to make certain alterations to the house in question, which I shall call hereafter the north house, and the one adjoining to the south which also belonged to him. From the plan annexed to the application it is clear that the only alteration to the north house which defendant's engineer proposed was to build three privies—one on the top of the other—at the north-west corner of the north house which if built in accordance with the plan would have blocked up window No. 1 wholly and Nos. 3 and 4 partially. The plans were returned in May 1906 with Exhibit I. This was in the usual form of the sanction granted by the Executive Engineer to a building application and contained several conditions which had to be complied with before building could be commenced. On the 5th September defandant got a notice from the Municipal Commissioner (Exhibit 3) to pull down a portion of the existing wall of his north house as it was unsafe, and in consequence he gave up the idea of making the proposed alterations. If, therefore, as the plaintiff alleges the defendant had been talking in October about his intention of raising his house higher than Fakirchand's he could not have been referring to his intention to make the alterations mentioned in Exhibit H.

Only two theories are possible : (1) He must have been talking of some altogether new plans. But there is not the slightest evidence that he ever had had any.

(2) He was in need of some excuse to get rid of Fa[illegible]'s repeated requests for permission to come on to his [illegible]

property. The evidence, however, of Mr. Merwanji, the defendant's engineer, completely clears up the confusion introduced by the somewhat conflicting statements of the plaintiff's witnesses as to the repairs and alterations to the north house. Defendant called him in to advise about the notice of the 5th Setpember. He advised defendant to pull down the rotten portion which was some feet from the eastern end of the north wall of the north house right away from the plaintiff's premises. This was the only work that was done by the defendant before plaintiff's notice of the 30th October. Defendant also showed Mr. Merwanji Mr. Hate's plans and Exhibit 1. In October Mr. Merwanji advised that, if the conditions of the Executive Engineer were complied with, it would necessitate a completely new building and defendant had better give up the idea. While examining the north house in consequence of the notice of the 5th September Mr. Merwanji found some rotten timber in another portion of the north house at the west end and advised that certain repairs and alterations should be executed. These works were commenced about the 25th November and presumably were the cause of the plaintiff's filing this suit. Unfortunately, Mr. Merwanji made no plan of his proposed alterations, but he has told us now what was intended and what was done before the work was stopped by the injunction. The part of the roof which sloped towards the plaintiff's house was to be removed and a terrace built over the existing privy at the north-west corner, and four posts were to be renewed. Actually the old roof had been removed and four new posts put in exactly in the place of the old ones. The four ground floor posts were 8″ by 8″, the distance from wall to wall being 14′. The first floor posts were 7″ by 7″ : a small excavation was also made in the south wall for the purpose of the terrace. There was no intention of raising the building higher than it had been before; that could not have been attempted without submitting plans to the Municipality.

It has been argued for the plaintiff that the new posts were capable of carrying a building of a ground floor and three upper stories and that therefore she was justified in filing the suit. It is really difficult to treat such a contention seriously. If the defendant had pulled down his north house entirely, and had

erected a framework on the ground floor complying with the Municipal regulations for a building of three upper stories, the plaintiff might have had cause for apprehension, but the mere fact that defendant renewed 4 old posts with new ones of greater dimensions could not possibly have justified an action on the part of the plaintiff. There is no doubt that plaintiffs in light and air cases have often to be content with damages if they cannot get an injunction in time from the Court. It is, therefore, necessary to take proceedings at the earliest opportunity, but the limits which have been imposed on *quia timet* actions are fully set out in *Pattisson* v. *Gilford*[1] and *Fletcher* v. *Bealey*[2] cited by Mr. Jinnah for the defendant. In my opinion there was not the slightest justification for the filing of the suit. The plaintiff has failed to prove either that there was imminent danger or that the damage from the apprehended danger if it came would be irreparable. She says in effect she was afraid the defendant would build a three-storied building. This could have been done without causing her any damage. The argument that the defendant intended to build so as to cause damage because he told Dorabji and Nagarchand that there was no necessity for plastering Fakirchand's wall (even assuming the contention to be proved) and that therefore there was imminent danger apprehended by the plaintiff before the suit was filed fails on the ground that there is no evidence that plaintiff's agent knew what has now been deposed to by Dorabji and Nagarchand. All he says is: "I filed the suit because the rear portions of defendant's house had been pulled down and defendant intended to build three stories"

The suit must be dismissed with costs throughout, including the costs of all interlocutory proceedings and the intended application for postponement.

Suit dismissed.

Attorneys for the plaintiff: *Messrs. Bhaishankar, Kanga & Girdharlal.*

Attorneys for the defendant: *Messrs. Daphtary, Fereira & Divan.*

B. N. L.

(1) (1874) L. R. 18 Eq. 259 at pp. 262, 263. (2) (1885) 28 Ch. D. 688.

ORIGINAL CIVIL.

Before Mr Justice Davar.

1907. *August* 19

KHETSIDAS *and* LACHMINARAYAN, PLAINTIFFS, *v.* NAROTUMDAS GORDHANDAS AND ANOTHER, DEFENDANTS.*

Civil Procedure Code (Act XIV of 1882), section 59—High Court Rule 162—Practice—Inspection of documents not referred to in the plaint—Right of defendant to inspect last documents before filing his written statement.

Section 59 of the Civil Procedure Code requires a plaintiff to annex to his plaint a list of documents on which he intends to rely at the hearing.

It has heretofore been the practice not to order inspection of documents other than those referred to in the plaint or relied on in the l st annexed to the plaint till after the written statement is filed.

This is not an inflexible rule in all cases for there may be many cases where it would be imperative to order the plaintiffs to produce and give inspection to the defendant before he has filed his writeen statement of a document or documents which they may not have mentioned in their plaint or enumerated in the list of documents annexed thereto.

Summons in Chambers before Davar, J.

The facts are fully set forth in the judgment.

Setalvad, for the plaintiffs.

Raikes (acting Advocate General), for the defendants.

DAVAR, J:—This is a judge's summons taken by the defendants calling upon the plaintiffs to show cause why they should not "give inspection of the original contracts referred to in para. 3 of the plaint." The defendants have not filed their written statement and they contend that they are entitled to inspection before filing their written statement. The plaintiffs, on the other hand, object to give inspection before the written statement is filed. Our Rule 162, which corresponds with Order XXXI, r. 15, entitles a party to call upon the other side to produce for his inspection any document or documents referred to in the pleadings.

The question is:—Are the documents of which inspection is sought referred to in the plaint? Reference is no doubt made in para. 3 of the plaint to "several contracts", but this particular

* Original Suit No. 217 of 1907.

paragraph of the plaint is very inartistically worded. The argument before me by counsel has made things much clearer. It seems that the defendants' father gave certain orders for purchase and sale of cotton and linseed which the plaintiffs carried out on his behalf. The plaintiffs have given inspection of the orders given by the defendants' father—they have also given inspection of the entries in their *soda nondhs* purporting to show that they had carried out his orders. Those entries, copies of which were produced before me, refer to certain contracts entered into by the plaintiffs with *other* merchants in putting through the orders of the defendants' father. Inspection is sought of those contracts. I do not think those are the contracts referred to in para. 3 of the plaint.

The decision of Mr. Justice Farran in *Ram Dyal Saligram* v. *Nurhurry Balkrishna*[1], based on the decision in *Quilter* v. *Heatly*[2], has long been acted upon in our Court and establishes the right of the defendant to inspect all such documents as the plaintiff refers to in his plaint and mentions as documents on which he will rely at the hearing before the defendants' written statement is filed. Section 59 of the Civil Procedure Code requires a plaintiff to annex to his plaint a list of documents on which he intends to rely at the hearing. The documents of which inspection is sought are not documents included in the list of documents annexed to the plaint enumerating the documents the plaintiffs will rely upon. Technically therefore the defendants are not entitled to claim inspection at this stage of the contracts entered into by the plaintiffs with other merchants in connection with the orders given to the plaintiffs by the defendants' father during his lifetime. As it has heretofore been the practice not to order inspection of documents other than those referred to in the plaint or relied on in the list annexed to the plaint till after the written statement is filed I will follow the practice and must decline to order the inspection that is sought in this summons. I must not, however, be taken as saying that this is to be the inflexible rule in all cases for I can conceive of many cases where it would be imperative to order the plaintiffs to produce and give inspection

(1) (1891) 18 Bom. 368. (2) (1883) 23 Ch. D. 42.

1907.

KHETSIDAS
v.
NAROTUMDAS.

to the defendant before he has filed his written statement of a document or documents which they may not have mentioned in their plaint or enumerated in the list of documents annexed thereto.

Before concluding I feel that I ought to say that the action of the plaintiffs in resisting inspection of the contracts mentioned in their *soda vahi* is open to grave adverse comment. The plaintiffs are suing the sons of a constituent of theirs who is now dead. Both the boys were minors when the transactions referred to in the plaint are alleged to have been entered into on behalf of their father and on his account. They know nothing about these transactions except what the plaintiffs choose to tell them. They want more information by means of inspection of documents which, if the entries in the *soda vahi* are truthful, must exist and be in the plaintiffs' possession. This is resisted and I regret to say successfully. In the case before Mr. Justice Farran, referred to above, counsel for the defence, in arguing for the plaintiff there, urged that the defendant may alter his defence from the one that he had already indicated if he got inspection of certain letters before filing his written statement. Even this argument is not open to the plaintiffs in this case for the defendants know nothing of the transactions in respect of which they are sued and they require fuller information before they formulate their defence. The plaintiffs will be bound to give inspection of these contracts as soon as the written statement is filed. No reason whatever has been urged before me why the plaintiffs should not produce these contracts for defendants' inspection now. All that is urged before me is, the defendants according to the practice prevailing in this Court is not entitled to inspection of these documents now. Of course this attitude leaves the action of the plaintiffs open to the justifiable comment that these contracts either do not exist at present or that there is something in them, or in connection with them, which is suspicious and requires concealment.

If there had been more candour and less technicality in dealing with the young sons of a dead constituent, the action of the plaintiffs would have reflected more credit on themselves and less suspicion on their transactions.

I dismiss the summons so far as it applies for inspection at present. Costs will be costs in the cause. I certify for counsel.

Attorneys for the plaintiffs;—Messrs *Malvi, Hiralal, Mody & Ranchhoddas*.

Attorneys for the defendants:—Messrs. *Mansukhlal, Jamshetji and Hiralal*.

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

JAN MAHOMED ABDUL LATIFF AND ANOTHER, RELATORS AND APPELLANTS, *v.* SYED NURUDIN BIN SYED HISAMUDIN RAFAH AND OTHERS, DEFENDANTS AND RESPONDENTS.*

1907. August 6.

Civil Procedure Code (Act XIV of 1882), section 539—Suit by Advocate General at instance of relators dismissed—No appeal by Advocate General—Appeal by relators—Maintainability.

A suit having been brought by the Advocate General he is the proper party to appeal and not the relators. The relators are not parties to the suit and as relators they have no right to step in when the Advocate General, who was plaintiff, has not thought fit to appeal against the dismissal of the suit.

THIS was a suit brought by the Advocate General at the instance of relators under the provisions of section 539 of the Civil Procedure Code.

On the 8th of February 1907 upon motion by the defendants the Court ordered the plaintiff's relators to provide security to the satisfaction of the Prothonotary for the balance of the estimated costs of the defendants within a certain time.

On the 7th March the Court ordered the suit to stand dismissed. A month having elapsed and no real effort made to give security as required against this order the defendants appealed.

Strangman with *Bahadurji* for respondents contended that the appeal was not maintainable because the Advocate General was

* Original Suit No 773 of 1905, Appeal No. 1452.

1907.

JAN MAHOMED v. SYED NURUDIN.

not a party. The relators only sustain the action, they are not parties to the suit, see Daniell's Chancery Practice, Volume I, p. 56, and *Attorney-General* v. *Wright*[1].

Talyarkhan and *Padsha*, for the appellants.

CHANDAVARKAR, J.—We are against the appellants on the preliminary objection to this appeal raised by the respondents' counsel. We are of opinion that the suit having been brought by the Advocate General, he was the proper party to appeal and not the relators who have filed this appeal. They were not parties to the suit and as relators they have no right to step in when the Advocate General, who was plaintiff, has not thought fit to appeal against the dismissal of the suit.

The authorities cited by Mr. Strangman, viz., Daniell's Chancery Practice, Vol. 1, page 56, and *The Attorney General* v. *Wright*[1], are in point.

The appeal must, therefore, be dismissed with costs (including the costs reserved yesterday) upon the ground that the appeal does not lie at the instance of the relators.

Appeal dismissed.

Attorney for the appellants: Mr. *M. B. Chothia.*

Attorneys for the respondents: Messrs. *Captain and Vaidya.*

B. N. L.

(1) (1841) 3 Beav. 447.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton.

PURSHOTTAM NARAYAN, APPLICANT, *v.* BALVANT BABAJI, OPPONENT.*

1907. *November* 15.

Bombay Abkari Act (Bom Act V of 1878), section 16(1)*—Country-liquor—Attachment in execution of a money decree—Sale*

Country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court.

Under section 16 of the Bombay Abkari Act (Bom. Act V of 1878) the Collector's permission is necessary for the sale, but it is not necessary to the attachment so far as the attachment can be made without removal of the liquor. But sale without the Collector's permission would apparently subject the seller to prosecution under the Bombay Abkari Act (Bom. Act V of 1878).

REFERENCE by P. V. Gupte, Judge of the Court of Small Causes at Poona, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms:—

I have the honour to refer the following questions to the Honourable High Court for its decision under section 617 of the Civil Procedure Code:—

1. Whether country-liquor is exempted from attachment and sale in execution of a money decree passed by a Civil Court?

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* Civil Reference No. 2 of 1907

(1) Section 16 of the Bombay Abkari Act (Bom Act V of 1878) runs as follows:—

16 Except as is hereinafter otherwise provided, no liquor, no hemp and no intoxicating drug shall be sold without a license or pass from the Collector:

Provided that in the City of Bombay, and in such other places as Government may from time to time direct, no such license shall be necessary for the sale of any liquor not manufactured or produced in India, in its original casks or packages as imported, or in small quantities as *bonâ fide* samples.

Provided, further, that no such license shall be necessary for the sale—

(1) by a person holding a license under this Act for the possession or cultivation of hemp and making such sale in accordance with the terms of such license, or

(2) by a cultivator or owner of any plant other than hemp from which any intoxicating drug is produced, of those portions of the plant from which such intoxicating drug is manufactured or produced, to a person holding a license under this section for the sale of intoxicating drugs, or to a person duly licensed under this Act to manufacture or to export intoxicating drugs.

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PURSHOTTAM v. BALVANT.

2. If not, whether the Collector's permission is necessary for its attachment and sale?

One Balvant Raghoba obtained a money decree (No. 2236 of 1905) against one Balvant Babaji Gurav (a licensed liquor seller) in this Court, and his assignee Purushottam Narayan Jogelkar presented a darkhast (No. 262 of 1907) for its execution by attachment and sale of the judgment-debtor's moveable property that might be pointed out by him. A warrant was accordingly issued and entrusted to a bailiff of this Court for execution. When the bailiff went to execute the warrant the judgment-creditor pointed out to him three casks of country-liquor which were in the judgment-debtor's liquor-shop, and asked the bailiff to attach the same. The bailiff, accordingly, attached the casks and brought them into Court.

The Collector of Poona, however, objects to the attachment and sale of the said liquor on the grounds that his permission is necessary both for attachment and sale under the Bombay Abkari Act, 1878, and that, in the present case, he does not intend to give his permission (*vide* certified copies of his letters, No. 151, dated 25th January, and No. 104, dated 5th February 1907). It seems that he bases his objection on sections 12, 13 and 16 of the Act.

Liquor is not exempted from attachment and sale in execution of a decree (*vide* section 266 of the Civil Procedure Code). Whenever legislature have thought it expedient to exempt any property from judicial process, they have embodied express provision to that effect in the legislation. (*Vide*, for instance, Bombay Hereditary Offices' Act III of 1874, section 13, Pensions' Act XXIII of 1871, section 11, see also clauses (*a*) to (*n*) of the above-mentioned section 266 of the Civil Procedure Code.)

Neither the Abkari Act nor any other enactment contains any such express provision with regard to liquor, and as it is not exempt from attachment, the sanction for its removal to the Court-house after its attachment, is naturally implied. It thus appears that the provisions of the Abkari Act do not apply to judicial process or sale. Moreover, section 61 of the Act provides that "Nothing in this Act affects the Cantonments Act, 1889, or Act XVI of 1863 (an Act to make special provision for the levy of the excise duty payable on spirits used exclusively in arts and manufactures or in chemistry), *or any enactment passed by the Governor General in Council since the 16th November 1861*, the date on which the Indian Councils Act came into force" As the present Code of Civil Procedure is an enactment passed by the Governor General in Council in 1882, its provisions are not affected by the Abkari Act and consequently processes issued under the said provisions are also not affected by the said Act. My opinion, therefore, on both the above-mentioned questions is in the negative.

J. R. Gharpure appeared for the applicant (assignee of the judgment-debtor):—Our first contention is that the present reference cannot lie. Section 617 of the Civil Procedure Code

refers only to matters which arise in a litigation between parties: *Ghella Tarachand* v. *The Collector of Ahmedabad*[1]. A claim by a stranger cannot be inquired into under section 278 of the Code: *Ramanathan Chettiar* v. *Levvai Marakayar*[2], see also *Murigeya* v. *Hayat Saheb*[3] according to which sections 278 and 283 have no reference to questions arising between judgment-creditor and judgment-debtor: see also *Varajlal* v. *Kachia*[4] and *Mukarrab Husain* v. *Hurmat-un-nissa*[5], which support our contention. The Collector is not a party to the suit and any objection by him, he being a stranger, cannot give rise to a reference. If the Collector feels aggrieved he can resort to the procedure laid down for third parties in the Civil Procedure Code.

Next, we contend that country-liquor can be attached and sold in execution of a decree. It has not been exempted from attachment under section 266 of Code, nor is it property not liable to attachment. There is no ruling exactly on the point, but a similar case had arisen under the Arms Act: *Wala Hiraji* v. *Hira Patel*[6]. It was held there that arms can be attached and sold in execution. It was, no doubt, a case decided specially with reference to the provisions of section 1 (*b*) of the Arms Act. In section 61 of the Abkari Act there is a similar reservation. The Abkari Act was passed in 1878 and the Civil Procedure Code in 1882. Therefore as liquor is not mentioned in section 266 of the Code, the Legislature did not intend that it should be exempted from attachment and sale.

Thirdly, it is not necessary to obtain the Collector's permission for the sale, see Cordeaux's Rules, pp. 432, 433, section 27 (1), 436 Form A (2). From these and the actual practice observed, it will be seen that all liquor is stored in the distillery and after the price of the liquor and Government dues are paid, a pass is furnished to the contractor and on the production of it he is allowed to remove the quantity of liquor mentioned therein. This procedure and the language of the conditions attached to the license show that the liquor is the property of the contractor and as such it is

(1) (1882) P. J., p. 257.
(2) (1899) 23 Mad. 195.
(3) (1898) 23 Bom. 237.
(4) (1896) 22 Bom. 473.
(5) (1895) 18 All. 52.
(6) (1885) 9 Bom. 518.

liable to attachment. The Court can attach whatever belongs to the judgment-debtor and in the present case the judgment-debtor's property includes both the liquor and the power to sell under the license and the Court can command the judgment-debtor to sell under his license.

Under the rules, it will be seen, there is a further way of working out the sale in small quantities to each purchaser—say not more than six bottles to each purchaser—and for doing this no permission of the Collector would be necessary.

M. B. Chaubal (Government Pleader) appeared for the Collector of Poona:—The Judge is of opinion that country-liquor is liable to attachment because it is not specifically excluded by section 266 of the Civil Procedure Code; but under that section the Court can attach only that property which is saleable and we contend that country-liquor is not saleable without the Collector's certificate. It is only the license that makes it saleable. Therefore, in order to make it liable to attachment and sale, the Court must previously obtain a license from the Collector. We further contend that the liquor does not belong to the judgment-debtor as his absolute property. After his death it does not go to his heirs as his property, but it reverts to Government: *In the matter of Madho Pershad*[1].

W. B. Pradhan (amicus curiæ) appeared for the opponent (judgment-debtor).

HEATON, J.:—This reference has been made by the Judge of the Court of Small Causes in Poona in the course of execution proceedings wherein the judgment-creditor caused to be attached three casks of country-liquor which were in the judgment-debtor's shop. These casks were removed to the Court-house and it was presumably the intention of the judgment-creditor to have them sold.

The Collector at Poona intervened, his intervention taking the form of letters addressed to the Judge. He stated that the liquor should not have been removed without a transport or permit from his office; that it could not be sold without a permit under

(1) (1900) 22 All. 441.

the Abkari Act; and that the purchaser could not remove it without a permit which, the Collector stated, he did not intend to give, and he asked that attachment might be removed.

This has caused the Judge of the Court of Small Causes to feel doubt as to the answers to the following two questions which he has referred to this Court:—

1st. Whether country-liquor is exempt from attachment and sale in execution of a money decree passed by a Civil Court, and

2ndly. If not, whether the Collector's permission is necessary for its attachment and sale.

The answer to the first question must, in my opinion, be in the negative. Nothing has been pointed out to us in the law from which we can infer that country-liquor is exempt from attachment and sale in execution. The liquor had admittedly been purchased and paid for by the judgment-debtor; it was his property. There was no doubt it could be sold by him though he had to deal with it in accordance with the terms of his license and the provisions of the Abkari Act. It is therefore clear that it is saleable property, and is covered by the provisions of the first part of section 266 of the Code of Civil Procedure.

But the answer to the second question is different. The Collector's permission is necessary for the sale as appears from section 16 of the Bombay Abkari Act. But it is not necessary to the attachment so far as the attachment can be made without removal. By the Collector's permission being necessary I mean that the sale without his permission would apparently subject *the seller to prosecution under the Abkari Act. Whether the* seller would be able to make a good defence to such a prosecution is a matter on which it is unnecessary, even were it possible, to express any opinion now.

It was argued that the reference is bad because it arises out of the action taken by a third person not a party to the suit. But this argument is of no weight in this case. The Judge has to determine whether he can rightly order the liquor to be sold and is in doubt on the point, therefore he is entitled under section 617, Civil Procedure Court, to make the reference.

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TABLE OF CASES REPORTED.

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CRIMINAL REVISION.

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Held, that the District Judge had no jurisdiction to accord the sanction on appeal, under section 195 of the Criminal Procedure Code (Act V of 1898), *inasmuch as there was no sanction given or refused by the Subordinate Judge*. The only jurisdiction which the District Judge had under the circumstances was to revise the order passed by the Subordinate Judge dismissing the applications as for default.

Held, further, that there was no provision in the Criminal Procedure Code (Act V of 1898) which warranted the Subordinate Judge in rejecting or dismissing the application of the Public Prosecutor because of his failure to appear at the time the application was called on for dismissal. The Subordinate Judge was bound to consider the application on its merits, even though the party who made it was not there to help the Court.

Held, also, that the Subordinate Judge had no power to review his order because the Criminal Procedure Code contained no provision giving jurisdiction to a Court to review orders passed under it.

IN RE GOPAL SIDDESHWAR ... ... (1908) 32 Bom. 203

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 195, 476—*Indian Penal Code (Act XLV of 1860), secs. 193, 210—Sanction to prosecute—Refusal by Subordinate Judge—District Judge on appeal may institute proceedings under sec. 476—Court—Interpretation.*] An application was made to a Subordinate Judge for sanction to prosecute *L* for offences punishable under sections 193 and 210 of the Indian Penal Code (Act XLV of 1860). The Subordinate Judge refused to grant the sanction. On appeal, the District Judge varied the order and directed the lower Court to prosecute *L* for an offence under section 210 of the Indian Penal Code.

Held, that the District Judge had jurisdiction to pass an order under section 476 of the Criminal Procedure Code (Act V of 1898); that it was not competent to him to direct the Subordinate Judge to prosecute *L* for an offence under section 210 of the Indian Penal Code and that he should himself have proceeded according to clause (*b*) of section 195 read with section 476 of the Criminal Procedure Code.

The word "Court" in section 476 of the Criminal Procedure Code includes within its scope the other Courts to which such Court is subordinate referred to in section 195 of the Code.

Begu Singh v. *Emperor* (1907) 34 Cal. 551, dissented from.

IN RE LAKSHMIDAS LALJI ... ... (1907) 32 Bom. 184

DAMAGES—*Vendor and purchaser—Contract to sell immoveable property—Indian Contract Act (IX of 1872), sec. 73.*

See CONTRACT ACT 165

DECREE—*Decree for an injunction to protect land—Sale of the land—Subsequent suit by the purchaser for an injunction—Execution of the former decree cannot lie—Civil Procedure Code (Act XIV of 1882), secs. 232, 244, 372 and 647.*

See CIVIL PROCEDURE CODE 181

EXECUTION—*Civil Procedure Code (Act XIV of 1882), sec. 232, cl. (b)—Decree directing separate amounts with separate sets of proportionate costs to be recovered against defendants—Transfer of the decree in writing to one of the defendants—Application by the transferee to recover the amount due by the other defendant.*] A decree directed that a certain sum with proportionate costs be recovered against N and a certain other sum with proportionate costs be recovered against A. Subsequently A took a transfer of the decree in writing and applied

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not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold.

Umes Chunder Sircar v. *Mussummat Zahoor Fatima* (1890) L. R. 17 I. A. 201, followed.

Amongst Shias the creation of a life interest is allowed, and it appears according to Shia authorities that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, and otherwise, provided that there is no interference with the particular estate, and it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.

BANOO BEGUM *v* MIR ABED ALI ... ... (1907) 32 Bom. 172

PAUPER, PETITION TO SUE AS—*Prothonotary's decision—Application to Judge in Chambers—Right to be heard—High Court Rules, Rule 60 (a 1).*

See HIGH COURT RULES 163

PENAL CODE (ACT XLV OF 1860), SECS 193, 210—*Criminal Procedure Code (Act V of 1898) secs 195, 476—Sanction to prosecute—Refusal by Subordinate Judge—District Judge on appeal may institute proceedings under section 476—Court—Interpretation.*] An application was made to a Subordinate Judge for sanction to prosecute *L* for offences punishable under sections 193 and 210 of the Indian Penal Code (Act XLV of 1860). The Subordinate Judge refused to grant the sanction. On appeal, the District Judge varied the order and directed the lower Court to prosecute *L* for an offence under section 210 of the Indian Penal Code.

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IN RE LAKSHMIDAS LALJI ... ... (1907) 32 Bom. 184

REVIEW—*Criminal Procedure Code (Act V of 1898), sec. 195—Application for sanction to prosecute—Dismissal of the application for default—Appellate Court cannot grant sanction on appeal—Dismissal of application for default not* [illegible] *the Code.*] An application
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on the day and at the hour
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IN RE GOPAL SIDDESHWAR ... ... (1907) 32 Bom. 203

SANCTION TO PROSECUTE—*Dismissal of the application for sanction to prosecute for default—Appellate Court cannot grant sanction on appeal—Dismissal of application for default not permissible—Review of order not permissible under the Code—Criminal Procedure Code (Act V of 1898), sec. 195.*

See CRIMINAL PROCEDURE CODE 203

1908.

EMPEROR v. CHINTO.

D. A. Khare, for the accused.

PER CURIAM :—Mr. Khare, the learned Pleader for the opponent, in showing cause why the sentence should not be enhanced, asks us to allow him to discuss the evidence and satisfy us that his client has been wrongly convicted. But we cannot allow that as it has been the invariable practice of this Court in such cases to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. That practice has been consistently adhered to by this Court for over 25 years now, and ought, we think, to be followed. It was open to the opponent to apply for revision of the conviction, but having failed to avail himself of that, he cannot be permitted to assail the conviction in a proceeding where the sole question is whether the sentence passed by the lower Court is adequate or not. We enhance the sentence to one of rigorous imprisonment for two months in addition to the sentence of fine passed by the Magistrate which is to remain.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

MEGHBAI *v.* POONJABAI.*

1907. *March* 16.

High Court Rules, Rule 80 (a 1)†—Pauper, petition to sue as—Prothonotary's decision—Application to Judge in Chambers—Right to be heard.

The plaintiff filed a petition to be allowed to continue her suit in *formâ pauperis*. The petition was heard by the Prothonotary under Rule 80 (*a*) of the Bombay High Court Rules, 1901. The petitioner applied under Rule 80 (*a 1*) to have the matter adjourned into Court :

Held, that the party dissatisfied with the Prothonotary's decision is entitled to apply to the Chamber Judge to have the matter adjourned to him, and that the Judge in Chambers is bound to decide the matter for himself.

* Pauper Petition No. 17 of 1905.

† Rule 80 (*a 1*) of the High Court Rules (1st Edn.) runs as follows :—

Any party desiring to have any question decided by the Prothonotary, whether disputed or not, adjourned to the Judge, may apply to the Judge in Chambers for such adjournment, within eight days of the issuing of the order complained of or within such further period as the Judge for sufficient cause may allow.

1908.

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APPLICATION to Chamber Judge.

The facts appear from the Judgment.

DAVAR, J.:—The plaintiff in Suit No. 458 of 1905 filed this petition praying that she may be allowed to continue this suit in *formâ pauperis.* The matter was fully heard by the Prothonotary who, after recording evidence, delivered judgment on the 5th of February last, refusing to give leave to the plaintiff to continue the suit in *formâ pauperis.* On the 19th of February the petitioner's attorney applied to me in chambers under Rule 80 (*a 1*) to have the matter adjourned to me. I directed notice of this application to be given to the defendant's attorneys. On the 23rd of February last I heard the defendant's attorney and then made an order adjourning the matter to the Judge in chambers. The matter was fully argued before me on the 4th of March 1907 by Mr. Thakordas for the petitioner and Mr. Jamietram for the respondents. When adjourning the matter into chambers I gave directions at the request of the defendant's attorney to the plaintiff's attorney to file in the Prothonotary's office the grounds on which the application was based. This has been done

Rule 80 (*a 1*) is of recent introduction and I believe this is the first application under the Rule to the Chamber Judge. I was in doubt as to what was the extent of the powers conferred on the Judge in chambers by this Rule and as to whether the proceedings before me were in the nature of an appeal, review, or revision. I find that this Rule is framed from the practice followed in England under Order 55. Rule 15 under this Order provides for the delegation of some of the duties of the Judges of the Chancery Division to their Chief Clerks and Rule 69 provides for the taking of the opinion of the Judge. In *Upton* v. *Brown*[1] the Master of the Rolls expressly recognises the right of the party to have every item in an account in the course of being taken by the Chief Clerk adjourned to the Chamber Judge if the party is dissatisfied with the decision of the Chief Clerk. Then again in the case of *Smith* v. *Watts*[2], in discussing the question of adjournment to the Judge, Sir George Jessel, Master of the Rolls, says: "The Chief Clerk decided against them, and they

(1) (1882) 20 Ch. D. 731. (2) (1882) 22 Ch. D. 5 at p. 12.

then took the case to the Judge. That is not an appeal. They were entitled to have the opinion of the Judge." And Lord Justice Cotton follows up by the observation that the losing party has a right to *require* that the matter should be decided by the Judge himself.

Formerly all pauper investigations used to be put on the Board of a Judge hearing short causes and they were dealt with by the Judge. This duty is now under the Rules delegated to the Prothonotary and this has worked most satisfactorily and has saved a great deal of the Court's time. On the authorities however and under Rule 80 (*a 1*) it seems to be the right of a party dissatisfied with the Prothonotary's decision to apply to the Judge to have the matter adjourned to him and I take it that the Judge in chambers is bound to take up the matter and decide the matter for himself.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

RANCHHOD BHAWAN (PLAINTIFF) *v.* MANMOHANDAS RAMJI AND ANOTHER (DEFENDANTS)*

1907.
August 26.

Indian Contract Act (IX of 1872), section 73—Vendor and purchaser—Contract to sell immoveable property—Damages for breach of such contract.

The rule in *Flureau* v. *Thornhill* (1) is not law in this country.

Section 73 of the Contract Act imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract. In cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages.

Pitamber Sundarji v. *Cassibai*(2) distinguished.

THE facts of this case are clearly set forth in the Judgment.

Robertson and *F. Sorabji Talyarkhan* for plaintiff.

Strangman and *Setalvad* for defendants.

* Original Suit No. 416 of 1906.

(1) (1776) 2 W. Bl. 1078. (2) (1886) 11 Bom. 272.

MACLEOD, J.:—One Ichchalal Pranjivandas died on the 1st April 1869 having executed a will dated the 20th January 1869 (Exhibit C) by which he appointed Vasudeo Krishnaji and Purbhudas Pranjivandas executors. Vasudeo renounced and Purbhudas died in 1890. In 1897, Suit No. 652 of 1897 was filed by Bai Jadav, the widow, and Bai Devkore, the daughter, of the testator for *inter alia* the construction of the will. Under a decree of the Appeal Court in that suit, dated the 13th day of October 1899, the Court declared that two trustees should be appointed to carry out the trust under the will of the testator, and it was referred to the Commissioner to enquire as to who were fit and proper persons to be appointed such trustees. By an order of the 17th April 1901 made in the said suit, Manmohandas Ramji and Kalliandas Keshavdas, the 1st and 2nd defendants in the present suit, were appointed trustees under the said will with power to sell in one or more lots the properties of the testator mentioned in the said will. Acting under the said power to sell, the trustees contracted to sell certain portion of the testator's property in 1902, and the plaintiffs, in Suit 652 of 1897, took out a notice of the 19th February 1902 to restrain them from selling. The application was refused with costs on the 25th February 1902 (Exhibit I). Again in 1903 the trustees contracted to sell certain other portions of the testator's property and Bai Jadav filed Suit No. 191 of 1903 against the trustees and others to prevent the sale being completed. By an order dated the 6th August 1903 (Exhibit T) made in that suit the trustees were ordered to complete the sales. The suit abated owing to the death of Bai Jadav. By an agreement dated the 21st September 1904 (Exhibt A), the trustees contracted to sell a certain portion of the testator's property to the plaintiff in this suit, but by another agreement dated the 24th September 1904 (Exhibit B) the trustees contracted to sell another portion to the plaintiff and it was understood that this agreement was to be in substitution of the agreement of the 21st September 1904, and the earnest-money of Rs. 500 paid under that agreement was to be taken as having been paid under this agreement. The important words in Exhibit B are these: "As to whatever objections and disputes there may be in connection with the land the same shall be cleared at your cost." Correspondence followed between

Messrs. Motilal and Co. on behalf of the vendor and Messrs. Ardeshir Hormasji and Dinshaw for the trustees regarding the completion of the contract. But on the 1st December 1904 Mr. Hiralal Dayabhai, solicitor for Bai Devkore, wrote to Messrs. Motilal and Co. (Exhibit F) objecting to the sale on various grounds and giving notice that she was about to file a suit against the trustees. On the 3rd December 1904, Messrs. Motilal and Co. wrote to Messrs. Ardeshir Hormasji and Dinshaw calling on them to clear the objection. On the 22nd December 1904, Bai Devkore filed the threatened suit No. 882 of 1904. The plaint is Exhibit H. On the 7th February 1905, Messrs. Ardeshir Hormasji and Dinshaw wrote to Messrs. Motilal and Co. as follows: "We are taking steps to obtain an order from the Court to complete the sale herein and have already given notice of same to Bai Devkore." I may mention here that the whole of the correspondence annexed to the plaint has been put in as Exhibit E. The notice of motion (Exhibit J) was actually dated the 6th February 1905. On the 17th April 1905, the motion was brought on and was adjourned to the hearing of the suit, Bai Devkore undertaking to indemnify the trustees against any damages they might have to pay owing to the delay in hearing the motion and to pay within four days Rs. 500 as security for such damages. The order is Exhibit V. On the 26th August 1905, the suit came on for hearing but meanwhile negotiations had been going on for a settlement and a consent decree was taken (Exhibit L), the effect of which, as far as the trustees were concerned, was that they were relieved of their trusteeship on being fully indemnified by Bai Devkore *inter alia* against any claims that might be made against them by the present plaintiff. The notice of motion of the 6th February 1905 was by intention not referred to in the consent decree but was brought on on the 28th August and of course discharged by an order of that date (Exhibit Q). Correspondence followed between the plaintiff's and the trustees' solicitors to which it is not necessary to refer in detail, and eventually the earnest-money was returned on the 15th June 1906. The plaintiff then filed this suit, on the 10th July 1906, against the trustees praying for interest on the earnest-money, all costs, charges and expenses

1907.

RANCHHOD v. MANMOHANDAS.

Mr. Hiralal's letters of the 21st and 25th April 1906 the defence now set up was foreshadowed.

The plaintiff is, therefore, entitled to damages under section 73 of the Contract Act. But Mr. Strangman has argued that the rule in *Flureau* v. *Thornhill*[1], followed in *Bain* v. *Fothergill*[2], applies, namely that a purchaser of real estate cannot recover damages for the loss of his bargain but only his deposit and expenses, and that that rule has been held by this Court to be the law of British India: *Pitamber Sundarji* v. *Cassibai*[3]. But that rule does not apply to cases of wilful default: *Engell* v. *Fitch*[4]. Nor, it seems, to unreasonable omission to complete the title by taking some definite steps in the vendor's power: *Day* v. *Singleton*[5]. In that case the vendor failed to obtain the lessor's consent which was necessary to the sale. Lindley M. R. observes at p. 329. "If Dunn's representatives had tried to obtain the lessor's consent and had failed, Day could have obtained no more damages than those he has recovered...... why, then, should he obtain more damages if no attempt is made to obtain the lessor's consent than he would be entitled to if a proper effort to obtain such consent had been made and had failed? The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons on which it is based do not apply." If he had had the facts of this case before him I think the Master of Rolls would have expressed himself in exactly similar terms. Since if the motion of the 6th February 1905 had been heard on its merits and discharged, the same result would have followed as if Singleton had failed in a proper attempt to obtain the lessor's consent. It is quite clear the motion was not heard on its merits. Sir Francis Jeune says at p. 332: "The present action is not, I think, to be regarded as an action for

(1) (1776) 2 W. Bl. 1078.
(2) (1874) L. R. 7 H L. 158.
(3) (1886) 11 Bom. 272.
(4) (1869) L. R. 4 Q. B 659.
(5) [1899] 2 Ch. 320.

breach of contract to sell the lease of the hotel in question. It is really an action against Mr. Singleton for failing in his duty to obtain, if he could, the consent of the Charterhouse to a transfer." In this case the defendants agreed to clear objections in connection with the land and they failed to do so. I have already stated that in my opinion the defendants were not bound to consent to the consent decree of the 26th August 1905 without having the notice of motion heard on its merits, and whichever way one looks at it I cannot imagine a clearer case of wilful default. But further I am not prepared to hold that the rule in *Flureau* v. *Thornhill*(1) is law in this country. See Pollock and Mulla's Indian Contract Act at p. 263, and the dictum of Farran, C J., in *Nagardas Saubhagyadas* v. *Ahmedkhan*(2). "The legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities." In *Pitamber Sundarji* v. *Cassibai*(3) no reference was made to the Contract Act, and therefore that case cannot be taken as holding that the rule must be read into section 73 by which I am bound. When the Contract Act was passed *Bain* v. *Fothergill*(4) had not been decided, and the rule in *Flureau* v. *Thornhill*(1) had already been limited by subsequent decisions. As section 73 imposes no exception on the ordinary law as to damages whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. Each case should be dealt with on its own merits. To apply a rule of law which can only be extracted from a series of English decisions, instead of the law especially enacted for British India by the Legislature, would be to disregard the numerous rulings of this Court on that point. In this case the damages will be the difference, if any, between the contract price and the market value at the

(1) (1776) 2 W. Bl. 1078.
(2) (1895) 21 Bom 175 at p. 185.
(3) (1886) 11 Bom. 272.
(4) (1874) L. R. 7 H. L. 158.

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RANCHHOD *v.* MANMOHANDAS.

date of breach, and the plaintiff is entitled in addition to interest on Rs. 500 from the 24th September 1904 until the 15th June 1906 and the costs and expenses he was put to owing to the breach. There must be an inquiry into the damages.

Attorneys for the plaintiff:—*Messrs. Malvi, Hiralal, Mody and Ranchhoddas.*

Attorneys for the defendant:—*Messrs. Ardeshir, Hormasji, Dinsha & Co.* and *Messrs. Hiralal & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton.

1907. *September 27.*

BANOO BEGUM AND OTHERS, APPELLANTS AND OPPONENTS, *v.* MIR ABED ALI AND OTHERS,* RESPONDENTS AND APPLICANTS; AND MIR ABED ALI AND OTHERS, APPELLANTS AND APPLICANTS, *v.* MIR AUN ALI AND OTHERS,* RESPONDENTS AND OPPONENTS

*Mahomedan law—Creation of vested remainder by a Mahomedan—*Spes successionis*—Creation of life-interest amongst Shias allowed.*

It is possible for a Mahomedan to create a definite interest like what would be called in English law a vested remainder, and such a remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold.

Umes Chunder Sircar v. *Mussummat Zahoor Fatima*[1] followed

Amongst Shias the creation of a life-interest is allowed, and it appears according to Shia authorities that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, and otherwise, provided that there is no interference with the particular estate, and it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.

APPEAL from the judgment of Russell, J.

* Original Suit No. 535 of 1891. Appeals Nos 1479 and 1484

(1) (1890) L. R. 17 I. A. 201.

The material facts in this case are set out in the judgment of Jenkins, C. J.

Strangman and *Mirza*, for appellants in Appeal No. 1479 and for respondents Nos. 2 to 4 in Appeal No. 1484.

Robertson, for appellants in Appeal No. 1484 and for respondents Nos. 1 to 5 in Appeal No 1479.

JENKINS, C. J.—These appeals arise out of proceedings in execution of a decree, passed by consent on the 22nd December 1891, whereby it was directed (amongst other things) as follows:—

"And this Court doth further order that the land and dwelling-house situate at Bhendy Bazar or Parel Road in Bombay bearing Ward No. 8039, Street Nos 558, 60, 62, 64 and 123 and Collector of Land Revenue old No. 720, new No. 7892 and old Survey No. 1174 and new Survey No. 7530 be held and enjoyed by the second plaintiff for her life, and from and after her death that the same be sold by public auction and the net proceeds thereof be divided among the six sons of the first plaintiff, Khan Bahadur Mir Akbar Ali, and their heirs in equal shares after setting aside a sum of rupees three thousand out of the said sale-proceeds for the death ceremonies of the plaintiffs and also for the Moharum ceremonies, and that this sum shall be dealt with in accordance with any directions in that behalf that may be given by the second plaintiff by a writing under her hand or by her will and that the said second plaintiff do keep the said property in proper repair during her life and do pay all outstandings therefor."

The first plaintiff was Akbar Ali, the second plaintiff was his wife Umda Begum, and the six sons of the first plaintiff Abdul Ali, Abed Ali, Afzal Ali, Asgar Ali, Fatteh Ali and Zoolficar Ali and his daughter Bibijan were the defendants. Akbar Ali died in April 1894. On the 11th January 1898 Afzal Ali and Asgar Ali purported to transfer to Abdul Ali all their right, title, interest and share under the decree in the premises at Bhendy Bazar Street and also their one-third part or share in the moneys to arise from the sale.

In 1899 Afzal Ali died. On the 17th of June 1903 a transfer was expressed to be made by Fatteh Ali and Zoolficar Ali in favour of Abdul Ali of his right, title, interest and share in the property and the proceeds of sale.

1907.

BANOO BEGUM v. MIR ABED ALI.

On the 2nd December 1903 Umda Begum died. On the 27th of March 1905 Abed Ali purported to transfer in the same terms his interest and share in the Bhendy Bazar property and the proceeds of sale.

Then, on the 14th of June 1905, Abdul Ali died. Each transfer was for valuable consideration, and in each instrument of transfer there was a covenant for further assurance.

On the 24th of February 1906 Asgar Ali, Fatteh Ali and Zoolficar Ali notwithstanding the transfer by them gave notice of an application for sale of the Bhendy Bazar property and for distribution of the net sale proceeds amongst the sons of Akbar Ali and their heirs in equal shares as provided in the decree.

The application was resisted by those claiming under Abdul Ali on the ground that the applicants by reason of the several transfers had no interest in the decree entitling them to ask for its execution. No objection has been taken to the procedure adopted and the only question raised has been whether the transfers were operative.

They have been attacked on two grounds: first, it has been said that the interests they purported to pass were not capable of transfer, and, secondly, that each transfer was invalidated by reason of section 257A of the Civil Procedure Code.

The only ground on which it was claimed that the interests were incapable of transfer was that they came within clause (*a*) of *section 6 of the Transfer of Property Act, and it* was *not* suggested that there was any rule of Mahomedan law more favourable to the applicant's contention. That clause is in these terms: "The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." What therefore we have to consider is whether the interests and shares expressed to be transferred come within these words. *Manifestly the transfer by Abed Ali does not* come within the words, for Umda Begum was dead at its date and Abed Ali's interest had thus vested in possession.

But at the date of the other two transfers she was alive, and Afzal Ali did not even survive her. Therefore, it is argued, the transferors had not at the date of these two transfers anything more than a possibility within the meaning of clause (*a*) of section 6.

This contention rests on the view that the Mahomedan law does not recognize a vested remainder, and in support of this we have been referred to *Abdul Wahid Khan* v. *Mussumat Nuran Bibi*[1]. But the actual point there decided was as to the construction to be placed on the documents evidencing a compromise, though no doubt their Lordships were influenced in coming to their decision by the consideration that it appeared to them to be opposed to Mahomedan law to hold that the compromise created a vested interest similar to a vested remainder under the English law, for such an estate, they said, did not seem to be recognized by the Mahomedan law. In estimating the applicability of this decision to the present case it must be borne in mind that the parties were Sunnis and that their rights were governed by the Hanafee law.

In arriving at their conclusion their Lordships cited a previous decision of the Privy Council in *Mussamut Humeeda* v. *Mussamut Budlun*[2]. There the High Court of Calcutta had held that the effect of the transaction under discussion was that a Mahomedan son had created in his mother's favour a life-interest in the property in suit. As to this their Lordships of the Privy Council said: "Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction." And then their Lordships go on to say that they are of opinion that the expressions used taken in connection with the rest of the evidence are too weak to prove a transaction so improbable among Mahomedans as an alienation by the son for the life only of his mother.

(1) (1885) L. R. 12 I. A. 91. (2) (1872) 17 W. R. 525 (Civ. Rul.).

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It is true that their Lordships do not affirm the validity of such a transaction but they certainly do not discard it as impossible.

And this brings me to *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*(1). There a Mahomedan granted property in mokurruri to his second wife with the condition that if she should die childless it should go to his two sons by another wife. The second wife had no child. While the grantor was still alive a decree-holder attached the interest of one of the sons and after the grantor's death the right, title and interest of the judgment-debtor was sold. One of the questions discussed and determined by their Lordships was as to whether the purchaser took anything. It was decided that he did.

Their Lordships said:

"The sale took place, and the certificate was granted on the 22nd of September, 1879, and it is there certified that the decree-holder has been declared as the purchaser of the judgment-debtor's right in 1 anna out of 16 annas which were mortgaged, and so forth, and by another certificate there is a similar declaration as to the 7 annas. So that it is quite clear that the intention was to attach and to sell whatever right and interest the judgment-debtor Farzund had in the 8 annas of the property. The question is, what interest had he as regards these 17 dams? That depends upon the construction of the deed of the 26th of January, 1871 In that deed there may be some obscurity as to the exact interest that the children of Sultan Ali and his wife Amani Begum were to take, but as applied to the events that have happened there is no obscurity about it. Sultan Ali, the then owner of 1 anna and 14 dams, grants that share in mokurruri farm to his wife Amani Begum on this condition, that if she has a child by him the grant shall be taken as a perpetual mokurruri. Whether descendible to children or taken by children in remainder does not matter now (the deed is rather obscure on that point), but it is to go to the child of Sultan Ali and Amani Begum in perpetual inheritance. In case of no child being born, then it is only to be a life mokurruri, and after the death of Amani Begum the property is to come to the possession of the settlor's two sons, Farzund and Farhut. There is to be paid the Government revenue on the share of the estate, and one rupee to the settlor. At the time of the attachment Sultan Ali was still living, and, at all events, in contemplation of law there might be a child to take; but the deed confers upon the sons Farzund and Farhut a definite interest, like what we should call in English law a vested remainder; only that it was liable to be displaced by the event of there being a son of Sultan Ali by Amani

(1) (1890) L. R. 17 I. A. 201.

Begum. Between the attachment and the sale—very soon after the attachment—Sultan Ali died, and then the contingency, such as it was, was entirely put an end to. It is quite true the parties might not know whether Amani Begum was with child by Sultan Ali or not, but the fact was determined at that time, and there was no longer any contingency in the eye of the law. It does not, in their Lorships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves against being supposed to concur in an argument that was presented at the Bar, to the effect that if between the time of attchment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment-debtor has at the time. But taking the case most strongly against the plaintiff, supposing that he could get nothing but that, which was capable of attachment, and was actually attached on the 14th of April, 1879, their Lordships hold that, this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by section 266 this property was not liable to attachment, because it is there provided that 'The following particulars shall not be liable in attachment' and among them is, 'an expectancy in succession, by survivorship or other merely contingent or possible right or interest.' It seems to their Lordships that in all probability the High Court, who held that the 17 dams were not attached, must have had this section in their view, though they do not refer to it because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee, which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his life-time parted with the whole property, either to Amani Begum, his wife, and her children by him, or to his two sons. That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their Lordships therefore hold that as regards the 17 dams the plaintiff has the priority, and that the decree of the High Court is erroneous to that extent[1]."

This case then affirms the possibility of the creation by a Mahomedan of "a definite interest like what we should call in English law a vested remainder," and that such a remainder though liable to be displaced was not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold.

[1] (1890) L. R. 17 I. A. 201 at pp. 208, 209.

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Now here we have to do with Shias and not with Sunnis, and where they are concerned the creation of a life-interest is allowed. This is well recognized, and it is supported by Exhibits Nos. 4 to 9* which are extracts from Mahomedan law books, translated for the purpose of this case.

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* EXHIBIT No. 4.

(Translation of an extract in Arabic from an un-numbered page of Fazkiratal Fukaha, a Mahomedan Law-Book of the Shias, Vol. II, Chapter on Wakf).

* * * *

If A gives away his house to B by way of a Sukna, Umra or Rukba by fixing a period, the house does not go out of his (A's) ownership and it is lawful for (him) the owner to sell the house and in that case the Sukna and (? or) Umra does not become null and void—nay the Sakin (person enjoying Sukna) is entitled to the right of residence, which is already made over to him; consequently, if the purchaser was aware of the fact, he has no option to annul the contract but if he was not aware, it is optional for him to cancel the sale or to confirm it at the full price with a view to derive *(some other) benefit from the property*

EXHIBIT No. 5.

(Translation of two extracts in Arabic from Hadaik-un-Nadirah, a Mahomedan Law-Book of the Shias, Vol. V, page 514).

* * *

* * *

It is well known among the As-hab (Jurists) that Sukna (right of residence), Umra (life-interest) and Rukba (giving away a property for a fixed period or on condition that the same should ultimately revert to the survivor) do not become null and void by sale.

* * * *

* * * *

Since you have known that sale is lawful in the (above mentioned) case (of Sukna or Umra), if the profit of the property which is sold is already taken away (by the person enjoying the Sukna or Umra), the purchaser if he be aware of the fact, has no option (to put an end to the contract) because of his having gone in for a thing the profit of which has already been taken away. It is therefore obligatory on him to wait till the expiration of the period or (termination of) the life-interest, after which the profit will revert (to him). But it is lawful for him, pending the period and during the life-interest, to derive benefit out of the property by sale, gift, emancipation and such other acts as do not interfere with that particular interest (of Sukna or Umra).

EXHIBIT No. 6

(Translation of an extract in Arabic from an un-numbered page of Kifayatul, Ahkam, a Mahomedan Law-Book of the Shias, Section on Sukna, etc.)

* * * *

The genuineness of these texts has not been questioned, nor has any authority been cited in opposition to them.

And whatever can be given away as Wakf (i. e., an endowment) is lawful to be given away as Umra or Rukba.

* * * *

It (the contract of Sukna, etc., does not become null and void by sale—nay the fulfilment of what is stipulated is obligatory and the purchaser should wait till the expiration of the period or (termination of) the life-interest, after which the profit reverts to him . . . . According to the said Sahiha (correct tradition) but before that such acts as do not interfere with the interest (of the person enjoying Sukna, etc.) like sale, gift, emancipation, etc., are lawful for him.

* * * *

EXHIBIT No. 7.

(Translation of an extract of a Persian Law-Book of the Shia Sect called Sigh Ukud of Sheik Moortiza).

"And if the owner sells the house during the period, the right of residence is not thereby rendered null and void, but the purchaser will not be the owner of its profit during the time the residence lasts."

EXHIBIT No. 8.

(Translation of an extract in Persian from Jame-i-Abbasi, a Mahomedan Law-Book of the Shias, Section on Sukna (right of residence) and Umra (a life-grant or a life-interest), page 142).

Section 3 on Sukna and Umra :—

If a person says to another "Reside in this house so long as you are alive," then there are three conditions necessary for the same. First, proposal such as, "I have given you room in such and such a house." "I have given you a life-interest" (in such and such an estate) or "I have given you such and such a thing for such and such a time" and such other expressions as may be in keeping with the above. Secondly:—Acceptance. Thirdly.—Possession. And if the act of causing one to reside in a house is made contingent on his (the grantor's) own life or to that of the resident or if the time is fixed, (the contract) becomes binding by his (the resident's) taking possession (of the house) and the same reverts to the owner after the death of any of them as stipulated. Hence, if one says "you are to reside in this house so long as you are living," the same reverts to the owner on the death of the resident. And as to this case, if the owner dies, it shall not be lawful for the heirs of the owner to eject the resident. And if one says "Reside in this house till the time of my death," then the resident should vacate the same on the death of the owner. But if the resident dies before the owner, it shall not be lawful for the owner to eject the heirs of the resident during his own life-time. If the contract is not made contingent on death, he can eject the resident whenever he likes. And whatever is lawful to be given in Wakf is also lawful to be given in Sakna and Umra. And (the contract of) Sukna or Umra thereof does not become null and void by the sale of the house. And if the Sukna is absolute, the resident himself and his family (only) are to live in the same, but if the

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Held, that as the injunction did not run with the land, there was in the circumstances of the case, no bar to the plaintiff's suit.

APPEAL against an order passed by Dayaram Gidumal, District Judge of Surat, remanding a suit to the Court of B. G. Desai, Second Class Subordinate Judge of Surat.

One Atmaram Gopal, who was the owner of a certain piece of land, brought a suit against the defendants for a permanent injunction restraining the latter from causing him obstruction in passing over to his land through their adjoining land and obtained a decree. Subsequently Atmaram Gopal sold the land to Jamsetji Manekji Kotval and the defendants having caused obstruction to him also, he brought the present suit for a permanent injunction.

The defendants disputed *inter alia* the plaintiff's right to an injunction.

The Subordinate Judge dismissed the suit on the ground that the plaintiff should proceed in execution of the decree obtained by his vendor.

On appeal by the plaintiff the District Judge remanded the case for the following reasons:—

It is perfectly true that an injunction does not run with the land for if the defendants were to die, the remedy, being a remedy *in personam,* would die with them. But it is obvious that, if an injunction is given in favour of A as regards the right of way and the dominant tenement is assigned to B the right of way passes to B and B cannot say "I am the holder of the right under the assignment; but I can nevertheless insist on filing a second suit and harassing the defendants again." The defendants' heirs or assignees are not their representatives within the meaning of sections 134 and 244, Civil Procedure Code; but the plaintiffs' heirs or assignees are such representatives and *nemo debet bis vexari pro una et eadem causa.* (See Broom's Legal Maxims, p. 321, and I. L. R 13 All. 98.)

The only question therefore is whether a new cause of action has arisen to the assignee of the old decree-holder who obtained the injunction. I must reply in the negative. The right of way claimed is the same. The defendants are the same.

The permanent injunction already obtained was alive when the suit was brought,—and the mere fact that the person obstructed is not the old plaintiff does not matter. The assignee is his representative and he can execute the decree. It is said, section 232, Civil Procedure Code, does not apply, but if

that be held inapplicable, section 372 read with section 647 (as amended), Civil Procedure Code, does.

Considering all the circumstances, however, while I hold that a fresh suit is not maintainable, I direct (following I. L. R. 32 Cal. 332—335) that in the interests of justice the suit may be taken as an application to the Court for executing the decree, and remand the case under section 562, Civil Procedure Code, for trial on the merits. Costs to abide the result.

Against the said order of remand the plaintiff preferred an appeal.

K. N. Koyaji, for the appellant (plaintiff):—The District Judge erred in applying sections 372 and 647 of the Civil Procedure Code to the circumstances of the present case: *Goodall* v. *The Mussoorie Bank, Limited*[1], *The Collector of Muzaffarnagar* v. *Husaini Begam*[2], *Gocool Chunder Gossamee* v. *Administrator-General of Bengal*[3], *Harish Chandra Tewary* v. *Chandpore Company, Limited*[4].

An injunction is a personal remedy and does not run with the land. A purchaser from a party cannot be made a party to execution proceedings: *Sakarlal* v. *Bai Parvatibai*[5], *Dahyabhai* v. *Bapalal*[6], *Vithal* v. *Sakharam*[7]. The present suit is therefore not barred and we need not and cannot proceed to execute our vendor's decree.

M. N. Mehta, for respondent (defendant 1):—A perpetual injunction was decreed in favour of plaintiff's vendor. Therefore the plaintiff can, as the representative of his vendor, enforce the decree in execution. We admit there is a difficulty in applying sections 372 and 647 of the Civil Procedure Code to the present case, still section 232 will apply. All the rights under the former decree have passed to the plaintiff by his purchase.

JENKINS, C. J.:—This is a suit for an injunction. It has been decided by the District Court that the suit must fail as being barred by section 244 of the Civil Procedure Code. The bar is said to arise out of the fact that the vendor to the present

(1) (1887) 10 All. 97.
(2) (1895) 18 All. 86.
(3) (1880) 5 Cal. 726 at p. 731.
(4) (1903) 30 Cal. 961 at p. 964.
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(7) (1899) 1 Bom. L. R. 854.

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Held, that as the injunction did not run with the land, there was in the circumstances of the case, no bar to the plaintiff's suit.

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The defendants disputed *inter alia* the plaintiff's right to an injunction.

The Subordinate Judge dismissed the suit on the ground that the plaintiff should proceed in execution of the decree obtained by his vendor.

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The only question therefore is whether a new cause of action has arisen to the assignee of the old decree-holder who obtained the injunction. I must reply in the negative. The right of way claimed is the same. The defendants are the same.

The permanent injunction already obtained was alive when the suit was brought,—and the mere fact that the person obstructed is not the old plaintiff does not matter. The assignee is his representative and he can execute the decree. It is said, section 232, Civil Procedure Code, does not apply, but if

that be held inapplicable, section 372 read with section 647 (as amended), Civil Procedure Code, does.

Considering all the circumstances, however, while I hold that a fresh suit is not maintainable, I direct (following I. L. R. 32 Cal 332—336) that in the interests of justice the suit may be taken as an application to the Court for executing the decree, and remand the case under section 562, Civil Procedure Code, for trial on the merits Costs to abide the result.

Against the said order of remand the plaintiff preferred an appeal.

K. N. Koyaji, for the appellant (plaintiff):—The District Judge erred in applying sections 372 and 647 of the Civil Procedure Code to the circumstances of the present case: *Goodall* v. *The Mussoorie Bank, Limited*[1], *The Collector of Muzaffarnagar* v. *Husaini Begam*[2], *Gocool Chunder Gossamee* v. *Administrator-General of Bengal*[3], *Harish Chandra Tewary* v. *Chandpore Company, Limited*[4].

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plaintiff, of the land sought to be protected by the injunction, obtained in another suit an injunction to the effect now sought.

Therefore it is said the plaintiff's remedy is not by way of suit but of execution of the former decree.

The Judge of the lower appellate Court appears to rely on sections 372, 647 and 244 of the Civil Procedure Code. Mr. Mehta has felt that he could not support the decree on that ground. So he has had recourse to section 232, but at the outset he is met with the difficulty that there has been no transfer of the decree.

An injunction does not run with the land and therefore there is, in our opinion, in the circumstances of this case, no bar to the plaintiff's suit.

The order must, therefore, be reversed and the case must be remanded to be heard on the merits.

The plaintiff must get the costs of the appeal to this Court and the lower appellate Court.

Order reversed. Case remanded.

G. B. R.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

In re LAKSHMIDAS LALJI.*

1907.
December 9.

Criminal Procedure Code (Act V of 1898), sections 195, 476—Indian Penal Code (Act XLV of 1860), sections 193, 210—Sanction to prosecute—Refusal by Subordinate Judge—District Judge on appeal may institute proceedings under section 476—Court—Interpretation.

An application was made to a Subordinate Judge for sanction to prosecute L for offences punishable under sections 193 and 210 of the Indian Penal Code (Act XLV of 1860). The Subordinate Judge refused to grant the sanction. On appeal, the District Judge varied the order and directed the lower Court to prosecute L for an offence under section 210 of the Indian Penal Code.

Held, that the District Judge had jurisdiction to pass an order under section 476 of the Criminal Procedure Code (Act V of 1898); that it was not compe-

* Criminal application for Revision No. 269 of 1907.

tent to him to direct the Subordinate Judge to prosecute L for an offence under section 210 of the Indian Penal Code and that he should himself have proceeded according to clause (*b*) of section 195 read with section 476 of the Criminal Procedure Code.

The word "Court" in section 476 of the Criminal Procedure Code includes within its scope the other Courts to which such Court is subordinate referred to in section 195 of the Code.

Begu Singh v. Emperor[1] dissented from.

THIS was an application under section 435 of the Criminal Procedure Code (Act V of 1898) to revise an order passed by A. C. Wild, Acting District Judge of Ahmedabad.

The facts were as follows:—

Lakshmidas Lalji (the applicant) obtained a decree against one Chunilal Velji, by which he was to recover Rs. 366-12-0 by two instalments of Rs. 183-6-0, one instalment being payable in January 1906 and the other in January 1907.

On the 7th February 1906 Lakshmidas filed an application to execute the decree for both the instalments. At this date the second instalment had evidently become not due. It was pointed out to the Subordinate Judge, who ordered the decree-holder (Lakshmidas) to execute his decree for the first instalment only.

On the 16th November 1906 the decree-holder again applied to execute his decree for the full amount. At this date also the second instalment had not become due. Under this *darkhast* Lakshmidas obtained a warrant of attachment against Chunilal's property.

For this action Chunilal applied to the Subordinate Judge for sanction to prosecute Lakshmidas for intentionally giving false evidence in a judicial proceeding (section 193 of the Indian Penal Code) and for fraudulently obtaining an order for a sum not due or for a larger sum than was due (section 210 of the Indian Penal Code).

The Subordinate Judge refused to grant the sanction ... for.

(1) (1907) 34 Cal. 551.

On appeal the District Judge came to a different conclusion. He found it inexpedient to grant Chunilal a sanction to prosecute his creditor Lakshmidas, but in the interest of public justice he directed the Subordinate Judge to prosecute Lakshmidas for an offence punishable under section 210 of the Indian Penal Code.

Lakshmidas applied to the High Court.

Branson (with *G. S. Rao*), for the applicant:—Section 476 of the Criminal Procedure Code did not authorise the District Judge to pass the order he did. Under section 195 of the Code his powers are limited to revoking or granting a sanction. Apparently, the District Judge did not proceed under this section.

Treating, then, his order as one passed under section 476, it is clear that he had no jurisdiction to pass the order. The word "Court" in that section means only the Judge before whom the civil proceedings were conducted; and neither his successor in office nor the appellate Court come within its meaning. See *Begu Singh v. Emperor.*[1]

L. A. Shah, for the opponent:—In this case the application for sanction was made under section 195 of the Criminal Procedure Code. The Subordinate Judge refused to grant the sanction. It was, therefore, competent to the District Judge on appeal either to grant the sanction or to refuse it. But his jurisdiction is not confined to either of these alternatives. He can lodge a complaint also under section 476.

Sections 195 and 476 of the Criminal Procedure Code should be read together; and the word "Court" in section 476 must be construed to include the successor in office of the Subordinate Judge and also the Court to which the first Court is subordinate within the meaning of section 195. I submit section 476 has not been correctly construed by the Calcutta High Court in *Begu Singh v. Emperor.*[1]

There is no reason to suppose that the legislature while expressly providing for a complaint by the first Court as well as

[1] (1907) 34 Cal. 551.

the appellate Court, wanted to restrict the meaning of the word "Court" in section 476, in which only the procedure to be followed by the Court in lodging such a complaint is laid down.

CHANDAVARKAR, J.:—This is a petition by Lakshmidas Lalji for a revision of the order passed by the District Judge of Ahmedabad, directing the Subordinate Judge of Godhra to prosecute the petitioner for an offence under section 210 of the Indian Penal Code.

The circumstances under which the order has been passed are shortly these:—

The opponent Chunilal Velji applied to the Subordinate Judge for sanction under section 195 of the Code of Criminal Procedure to prosecute the petitioner, Lakshmidas Lalji, for offences under sections 193 and 210 of the Indian Penal Code.

The Subordinate Judge having refused to grant the sanction, the opponent Chunilal Velji appealed to the District Court. That Court held a *primâ facie* case for prosecution to have been made out, but deemed it expedient, "in the interest of public justice," to direct the prosecution of the petitioner by the Subordinate Judge rather than grant a sanction to prosecute a private party.

On the authority of a Full Bench ruling of the Calcutta High Court (*Begu Singh* v. *Emperor*[1]) it is contended before us that the District Judge had no jurisdiction to pass such an order. It is argued that the order for the prosecution of the petitioner by the Subordinate Judge for an offence under section 210 of the Indian Penal Code could only be made under section 476 of the Code of Criminal Procedure, but that this latter section has been held by the Calcutta High Court in the case just cited to apply only where an order is passed under it by the very Judge who tried the case in the course of the trial of which the alleged offence was, in the opinion of that Judge, committed, but not where such an order is passed by the successor of that Judge who did not try the case. Accordingly, it is contended that as here it was the Subordinate Judge who had tried

(1) (1907) 31 Cal. 551.

the case in the course of which the petitioner is alleged to have committed the offences under sections 193 and 210 of the Indian Penal Code, and as he declined to grant any sanction, the District Judge, who did not try the case, had no jurisdiction to revoke the Subordinate Judge's order and exercise or direct the Subordinate Judge to exercise the powers under section 476 of the Code of Criminal Procedure.

Clause (*b*) of section 195 of that Code provides that no Court shall take any cognizance of any of the offences of the Indian Penal Code therein specified (of which section 210 is one), "when such offence is committed in, or in relation to, any proceeding in *any Court*, except with the previous *sanction*, or on the *complaint* of such Court, or *of some other Court to which such Court is subordinate*." That is, if in the course of the trial of a case in a Subordinate Judge's Court, any of the offences specified in the clause is committed, it is open, not only to that Court but also to the District Court, to which that Court is subordinate, either to grant a sanction or prefer a complaint for the prosecution of the offender, although the District Court may have had nothing to do with the trial of the case itself. So far then as this clause of section 195 is concerned the Legislature has not confined the power to grant a sanction or to prefer a complaint only to the individual Judge before whom the trial of the case took place. Hence the reasoning of the Full Bench of the Calcutta High Court as to the scope of section 476 of the Code cannot be held to apply to this clause.

Now, the clause prescribes two courses, one of which must be followed to initiate a prosecution for any of the offences specified in it. One of them is a *previous sanction*, the other is a *complaint*. Some of the subsequent clauses of the section show what a *sanction* is. It is permission given to a private party to initiate a prosecution by filing a complaint. But nothing is said in any of those clauses about a *complaint* which either of the Courts mentioned in clauses (*b*) and (*c*) is empowered to prefer. That is because the Code has in some of the earlier sections of the Code defined the word *complaint* and prescribed the mode in which it is to be preferred. But seeing that that mode may not

be convenient to a Court empowered to initiate a prosecution in the interests of public justice, a special procedure is provided in section 476, clause (*c*), for such Court to follow when it exercises that power. Hence clause (2) of that section provides that when a Court has exercised the power in the manner prescribed by clause 1 of section 476, the Magistrate to whom the accused person is sent by that Court "shall thereupon proceed according to law, and *as if upon complaint made and recorded under section* 200".

Section 476, clauses 1 and 2, therefore, define the form, scope and nature of *the complaint* mentioned in clauses (*b*) and (*c*) of section 195. And the two clauses of the former section must be read with the two clauses of the latter, when any question about a prosecution started *upon the complaint* of a Court arises.

If they must be so read, it follows that the power under section 476 may be exercised either by the Judge, who tried the case, in the trial of which the alleged offence was committed, or by the Judge to whom he is subordinate. And if having regard to the plain language of clauses (*b*) and (*c*) of section 195, the latter can exercise the power under section 476 though the trial of the case was not before him, why should the Legislature be held to have intended that a successor of the former Judge *in the same Court* shall not similarly exercise the same power?

With great respect for the learned Judges who constituted the Full Bench of the Calcutta High Court in the case above-mentioned, we are unable to concur in their decision, because we do not find in those judgments any discussion of the relation of clauses (*b*) and (*c*) of section 195 to clauses 1 and 2 of section 476. It humbly appears to us that there is a close relation between the two and that the former throws light upon the scope and meaning of the latter. Clauses (*b*) and (*c*) of section 195 empower a Court to initiate a prosecution of its own motion by means of *its own complaint*. How that *complaint* may be preferred is not stated in that section, but it is stated in section 476, clause 1, because clause (2) of this section says that the proceedings adopted by a Court under clause 1 shall be treated as being in the nature of a *complaint*.

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The Full Bench of the Calcutta High Court have proceeded in support of their view upon certain words in section 476 and other grounds which either relate to the policy of the law embodied in the section or other extraneous considerations. In their opinion, when a Judge, after he has tried a case, is succeeded by another Judge in the same Court, the latter is not "the Court" contemplated by the Legislature for the purposes of the power exerciseable under section 476. In support of that view they lay stress upon the language of the section that the offence to be inquired into "must have been committed before" *the Court* or "brought under its notice in the course of a judicial proceeding". This is taken to mean *the Judge* who constituted "the Court" when trying the case. But if the "Court," taking the word in its ordinary signification, remains the same throughout, though the individual Judge constituting it and performing its function may vary from time to time, we fail to perceive, with due deference, how an offence committed before that Court or brought under its notice in the course of a judicial proceeding before it ceases to be such because the individual Judge, who tried the case or heard the proceeding, ceases to be the presiding Judge of that Court. Then it is pointed out in the judgment that there is a distinction between the powers exerciseable under the provisions as to *sanction* under section 195 and those exerciseable under section 476—that the latter are summary and must be exercised at or immediately after the close of the trial of a case. As to this also, with great respect, we fail to find anything in the language of section 476 which makes it incumbent upon a Court acting under it to exercise the power within any period or at any particular time. Such a construction necessitates the importing into the section of words which are not there; and for which there is no necessary implication from the language used by the Legislature. No doubt the procedure under section 476 seems summary as distinguished from the procedure in a prosecution started upon a sanction granted to a private party, because it empowers the Court to send the accused in custody to a Magistrate for trial. But the distinction is more apparent than real. When a private party files a complaint on the strength of the sanction granted

to him by a Court under section 195, it is open to the Magistrate who receives the complaint to order at once that the accused be brought before him in custody. In such a case, as soon as there is a complaint there is an arrest of the accused. Similarly, when the same Court, instead of granting a sanction to a private individual, itself moves under section 476, that Court is empowered to do what the Magistrate alone can do in the other case. That is the only difference between the two cases, but it does not follow that the one power is more summary than the other, because in one case the Court preferring the complaint can order arrest and in the other the arrest can be made at the instance of the Magistrate moved by the private individual. Another ground of the Full Bench is that "if months after the trial" of a case before a Court, that Court may act under section 476, it is difficult to appreciate the necessity of section 195. The necessity, we venture to think, is this. An offence may be committed in the course of a trial before a Judge, and no one may know anything about it. It may be discovered long after the trial has ended; the Judge or his successor may come to know of it in the course of some other trial or in some other way. No private party may think it worth his while then to apply for a sanction to prosecute; and yet in the interests of public justice it may become necessary that there should be a prosecution. In such cases section 476, as distinguished from section 195, becomes useful. To put a concrete case, a decree-holder applies for execution and in his application deliberately and fraudulently overstates the amount recoverable from the judgment-debtor. The latter, being illiterate, does not know of the fraud, and the decree is executed as applied for. Six months afterwards the decree-holder *in another case* admits before the same Court consisting of the successor of the Judge of that Court who had tried the case relating to the execution proceedings that the execution was fraudulent. He has clearly committed an offence under section 210 of the Indian Penal Code. But no one, not even the judgment-debtor, applies for sanction to prosecute. If the reasoning of the Full Bench of the Calcutta High Court is correct, then *in such a case*, in spite of the plain admission by the decree-holder that he has

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committed an offence the Court is powerless, because it cannot proceed against him under section 476 and there is no one to move it for a sanction under section 195; and public justice must suffer. It is impossible to suppose that such a construction of section 476 of the Code of Criminal Procedure could have been intended by the Legislature. There is no doubt this distinction between section 476 and section 195 that an order under the former is not but an order under the latter is appealable. But does it necessarily follow from that that the power under section 476 was intended by the Legislature to be exercised only by the Judge who tried the case but not by his successor? One reason for the distinction may be that when a Court is acting under section 476 it knows its responsibility and will not act unless the offence appears clearly to have been committed. There is no reason to suppose that the Court is actuated by any motive in initiating the prosecution. It may be otherwise when a private individual applies for sanction to prosecute. He may be impelled by personal considerations and the application may not be *bonâ fide.* In the former case, no right of appeal is given because it is the Court moving in the matter upon its own responsibility; in the latter the right is given to prevent any abuse of the process of a Court by private persons.

Under these circumstances we are constrained to dissent from the Full Bench ruling of the Calcutta High Court.

We must, therefore, hold in the case before us that the learned Judge of the District Court had jurisdiction to pass the order under section 476. The form of the order which he has actually passed, however, is not, strictly speaking, in conformity with that section, with which, as we have said, clauses (*a*) and (*b*) of section 195 must be read. The District Judge has directed the Subordinate Judge to prosecute the petitioner for an offence under section 210 of the Indian Penal Code instead of himself proceeding according to clause (*b*) of section 195 read with section 476. In order that the District Judge may follow that procedure we amend his order and direct that he proceed accordingly.

KNIGHT, J.—I entirely concur in the reasoning and conclusions of my learned colleague. If I may venture to offer a respectful criticism of the grounds upon which the decision in *Begu Singh* v. *Emperor*[1] proceeds, I would commence by observing that each of the three judgments delivered in that case is based upon a separate and distinct reason. In the first it is argued that sections 476 and 195 deal with different subject-matters, the one contemplating a summary proceeding by the Court of its own motion, and the other a prosecution by a private individual based upon a sanction: and it is pointed out that while there is an appeal from an order under section 195, there is none from one under section 476. No reference, however, is made to the fact that under section 195 a prosecution may be instituted, not only on the sanction of the Court, but also upon its complaint: the words *or on the complaint* being reiterated in each of the three enabling clauses of the section. It is difficult to understand how an appeal could lie from an order under this section directing a complaint to be filed. The jurisdiction of the appellate Court is confined to those cases in which sanction has been granted or refused and this Court has explicitly ruled that no appeal lies from an order under section 195 directing the institution of a complaint: *Queen-Empress* v. *Rachappa*[2]. I can, therefore, find no valid distinction between the two sections on this ground: nor, with all deference to the high authority in favour of the contrary view, can I detect anything more summary in the action of a Court which sends a case for inquiry or trial to the nearest Magistrate under section 476 than in one which directs a complaint to be instituted under section 195, although no doubt the former course is the speedier. The main effect of section 476, in my humble opinion, is to relieve the Magistrate from the necessity of observing the formalities prescribed by sections 200 and 204: formalities obviously superfluous in such cases as these. In this connection reference may be made to the opening words of section 200.

In the second of the three judgments the *ratio decidendi* appears to be that the officer before whom the offence is commit-

[1] (1907) 34 Cal. 551. [2] (1888) 13 Bom. 109.

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ted alone is in a position to say whether it is or is not a case for proceeding under section 476, and that if the powers conferred by the section are to be exercised by an officer devoid of p rsonal knowledge of the circumstances of the case, not only is th accused person deprived of a valuable safeguard, but there is no corresponding responsibility placed upon the private complainant as there would be under section 195. Here again it seems sufficient to point out that these are the precise objections, if objections they be, that could be raised to a prosecution under section 195 on the complaint of "some other Court to which such Court is subordinate," and that the law does not recognise their validity. It is a mistake, I think, to read that section as conferring a special protection upon a special class of offenders. Any person offending against the provisions of the Penal Code is liable to prosecution forthwith, be he perjurer or be he thief; but it is manifestly undesirable in the public interests that prosecutions of the particular classes dealt with in section 195 should be instituted on mere private initiative. The law has therefore provided a bar that must be removed before private complaints of such offences can be entertained: but the bar is one imposed in the interest of the public, not in that of the offender, and does not hamper or delay the institution of prosecutions by the public authorities concerned.

In the third judgment the view taken is that in the intention of section 476 the desirability of a prosecution should be expressly present to the mind of the Court during the proceedings in the course of which the offence was committed or brought to notice. The suggestion is, I think, sufficiently answered by the considerations on which I have dwelt; and for the rest I do not clearly apprehend how, when the officer originally presiding over the Court has been removed by death, transfer, or other causes, it is to be determined what may or may not have been expressly present to his mind during the proceedings.

I am therefore of opinion that the word *Court* in section 476 includes within its scope the other Courts to which such Court is subordinate referred to in section 195. I concur in the order proposed by my learned colleague for the reasons which he has given.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

ANANT VINAYAK GOKARN (ORIGINAL APPLICANT AND TRANSFEREE OF DECREE), APPELLANT, *v.* NAGAPPA SUBRAYA (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

1907.
December 16.

Civil Procedure Code (Act XIV of 1882), section 232, clause (b)—Decree directing separate amounts with separate sets of proportionate costs to be recovered against defendants—Transfer of the decree in writing to one of the defendants—Application by the transferee to recover the amount due by the other defendant.

A decree directed that a certain sum with proportionate costs be recovered against N and a certain other sum with proportionate costs be recovered against A. Subsequently A took a transfer of the decree in writing and applied for execution of the decree against N to the extent of the sum decreed against him. The application having been rejected under section 232, clause (*b*), of the Civil Procedure Code (Act XIV of 1882),

Held, reversing the order, that section 232 clause (*b*) of the Civil Procedure Code (Act XIV of 1882) was not applicable. Though the direction against N and the separate direction against A were contained on one and the same piece of paper and were passed in the same suit, still for all that they were decrees for separate sums of money and might equally well have been passed in separate suits. The fact of their being on one piece of paper cannot control the matter.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kárwár, confirming the order of K. R. Natu, Subordinate Judge of Kumta, in an execution proceeding.

One Kamakshibai, wife of Narayan Ramchandra, obtained a decree against (1) Nagappa Subraya and (2) Anant Vinayak Gokarn directing that "the plaintiff should recover from the defendant No. 1 Rs. 90 and proportionate Court costs Rs. 11-5-3, and also from the defendant No. 2 Rs. 30 and proportionate Court costs Rs. 3-12-1." Subsequently defendant 2 obtained a transfer of the decree in writing and applied for execution against defendant 1 for the recovery of the amount decreed against him. Defendant 1 contended, *inter alia*, that the transfer to defendant 2 was unjust and fraudulent.

* Second Appeal No. 419 of 1907.

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ANANT VINAYAK v. NAGAPPA SUBRAYA.

The Subordinate Judge found that the transfer to defendant 2 was invalid under proviso (*b*) of section 232 of the Civil Procedure Code (Act XIV of 1882) and he dismissed the application observing as follows :—

The proviso is not applicable only to cases where the decree for money against several persons is against them *jointly*. to say so would be to insert the word 'joint' before the words 'decree for money' in the proviso. Such an implied insertion is not warranted by the wording of the section nor by any decided case. Had the legislature intended to restrict the proviso to cases where the decree is jointly against several persons they would have said so expressly and would not have allowed such an important point to be gathered by implication only.

On appeal by defendant 2 the District Judge dismissed it summarily under section 551 of the Civil Procedure Code (Act XIV of 1882).

Defendant 2 preferred a second appeal.

N. A. Shiveshvarkar appeared for defendant 2 (transferee of the decree and applicant) :—The view taken by the lower Courts is erroneous and not warranted by section 232, clause (*b*), of the Civil Procedure Code That clause provides for cases in which decrees are passed jointly against several persons In the present case the decree is not joint. It is in fact two decrees against two persons, though on the same paper. The object of the proviso is to impose on the assignee of a decree, who might happen to be one of the judgment-debtors, the duty of proceeding by a suit for contribution. In the present case the assignee cannot proceed in that manner and the result would be to deprive him of all relief. Such could not have been the intention of the legislature. See *Degumburee Dabee* v. *Eshan Chunder Sein*[1]; *Lalla Bhagun Pershad* v. *Holloway*[2].

There was no appearance for the respondent (defendant 1).

JENKINS, C. J. :—This appeal arises out of proceedings in execution of a decree whereby it was directed that Rs 90 and a sum of Rs. 11-5-3 as costs be recovered against Nagappa, the present respondent, and Rs. 30 with Rs. 3-12-4 as costs aginst Anant, the present appellant.

(1) (1868) 9 W. R. 230 (Civ. Rul.). (2) (1885) 11 Cal. 393.

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The appellant Anant has taken a transfer of the decree by assignment in writing and he has applied for execution of this decree against Nagappa to the extent of Rs. 90 and the Rs. 11-5-3.

His application has been rejected on the ground that it comes within clause (b) of section 232 of the Code of Civil Procedure. The clause provides that "where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others."

Now the purpose of that clause was, not to deprive the transferee of a decree who might happen to be one of the judgment-debtors, of all relief, but to impose upon him the duty of proceeding by what was considered a more appropriate procedure, that is, a suit for contribution. Such a remedy is not open to the present appellant. Therefore one must see why he should be debarred from proceeding.

It is true that the direction against Anant and the separate direction against Nagappa are contained on one and the same piece of paper and were passed in the same suit. But for all that they are decrees for separate sums of money, and might equally well have been passed in separate suits; so that we do not think the fact of their being on one piece of paper can control the matter.

In our opinion the decree for money so far as it relates to the Rs. 90 and costs was not a decree against several persons but against one person, that is, Nagappa; and so far as that part of the decree is concerned, we do not think that the transfer of it to Anant comes within clause (b) of section 232 of the Code of Civil Procedure.

Therefore we hold that the decision of the District Judge was erroneous. It must, therefore, be reversed and the case sent back in order that it may be restored to the file and heard on its merits.

The costs of this appeal will be costs in the application.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.
January 10.

IN RE GANESHDAS PANALAL (ADJUDGED INSOLVENT)

R. D. SETHNA (APPLICANT AND APPELLANT) *v.* R. S. D. CHOPRA (RESPONDENT).*

Indian Insolvent Act (11 and 12 Vict., c. 21), sections 27, 26—Jurisdiction of the Insolvent Court outside the Bombay Presidency—Person in possession of Insolvent's property can be directed to hand it over to the Official Assignee.

The Court for the relief of insolvent debtors sitting in Bombay has jurisdiction to make an order under section 26 of the Indian Insolvent Act against a person residing outside the Bombay Presidency

ON the 10th November 1906 the firms of Shivnathrai Panalal carrying on business as merchants and commission agents and having their principal place of business at Amritsar and a branch only at Bombay stopped business and entrusted their property, both moveable and immoveable, to a Board of Trustees with the consent of a majority of their creditors by a trust deed which was duly registered, and handed over their books of accounts to such trustees who on examination found that they contained false entries showing that monies had been misappropriated by the Insolvents. On the 3rd December 1906 on the application of three of the creditors the Insolvent Estates Court at Amritsar made an order directing that notices be issued to the debtors calling upon them to show cause on the 12th December 1906 why they should not be declared insolvents and directing that their property both moveable and immoveable throughout the Punjab be attached

On the 12th December 1906, four of the insolvents appeared before the said Insolvent Estates Court at Amritsar and said that they had no objection to their being declared Insolvents.

The Court thereupon on the same day made an order declaring them insolvents, attached their property, and appointed the

* Appeal No. 1190.

1908

GANESHDAS PANALAL, *IN RE.*

R. D. SETHIA *v.* R. S. D. CHOPRA.

Registrar of the Small Cause Court at Amritsar receiver of the Insolvents' Estate

On the 31st May 1907, the Insolvents Debtors' Court of Bombay made an order adjudicating the same persons Insolvents and a vesting order was made on that day ordering that all the real estate and effects of the insolvents be vested in the Official Assignee under section 11 of the Indian Insolvent Act

On the 6th June 1907, the Official Assignee made an application to the Court at Amritsar praying for an order for removal of the attachment and for the delivery of the properties under attachment and the books of account of the Insolvents to him.

The said application was dismissed on the 17th June 1907 by the said Court holding, *inter alia*, that on the date on which the vesting order was passed by the Bombay High Court there were no rights subsisting in the Insolvents in the moveable and immoveable properties in the Punjab as all their estates had already vested in the receiver who was appointed under section 351 of the Civil Procedure Code. The Small Causes Court also directed the receiver to proceed with the sale.

An application was made on behalf of the Official Assignee on the 18th June 1907, to the Chief Court of the Punjab for stay of the sale proceedings, and for revision of the order of the Small Cause Court. The Chief Judge granted the stay of sale and issued a notice against the receiver to show cause why he should not hand over the property to the official Receiver.

On the receiver appearing before the Insolvent Debtors' Court at Bombay Mr. Justice Beaman decided that the Insolvent Debtors Court had no jurisdiction or power to order a receiver appointed by the Amritsar Insolvency Court and who was in possession of the Insolvents' property to hand over the assets to the Official Assignee in Bombay.

Against this decision the Official Assignee appealed.

Inverarity (with *Scott* and *Bahadurji*) for the appellant.

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In the course of his argument Inverarity referred to the following authorities:—

Callender Sykes & Co. v. *Colonial Secretary of Lagos and Davies*(1); *Waite* v. *Bingley*(2); *In re George Blackwell*(3); *In the matter of James Currie*(4); *In re Cockburn*(5); *In re Dorothea Ricks*(6); *In re Tietkins*(7); *In re Cawasji Ookerji*(8); *In re Ajudhia Prasad*(9); *In re Dwarkanath Mitter*(10); *In the matter of Umbica Nundun Biswas*(11).

F. Sorabji Talyarkhan for the respondent.

JENKINS, C. J.:—The only question that arises on this appeal is whether the Court for the Relief of Insolvent Debtors sitting in Bombay has jurisdiction to make an order under section 26 of the Indian Insolvent Act against a person residing at Amritsar. The merits of the case have not been discussed before us.

The Act was passed by the Imperial Parliament, which was competent to give the jurisdiction claimed; the words of the section are sufficiently wide for that purpose; and it is clear that under section 7 the Court sitting here is authorised to make an order that would affect estate and effects situate outside the Presidency of Bombay. I can, therefore, find no sufficient reason on the face of the Act for withholding from section 26 its literal and natural effect.

But then it is argued that the Amended Letters Patent have affected the jurisdiction of the Court.

By section 2 of the Indian Insolvent Act it is provided that the Courts established as therein mentioned shall be continued and continue to be Courts of Record and each shall continue to be styled "The Court for the Relief of Insolvent Debtors" and to be holden before any one Judge of the Supreme Courts of Judicature at Calcutta, Madras and Bombay, respectively, within the limits of the said Towns of Calcutta, Madras and Bombay.

(1) [1891] A. C. 460 at pp. 466, 467.
(2) (1882) 21 Ch. D. 674.
(3) (1872) 9 Bom. H. C. R. 461.
(4) (1896) 21 Bom. 405.
(5) (1867) 2 Ind. Jur. N. S. 326.
(6) (1866) 3 Mad. H. C. R. 151.
(7) (1868) 1 Beng. L. R. (O. J.) 84.
(8) (1888) 13 Bom. 114.
(9) (1871) 7 Beng. L. R. 71.
(10) (1869) 4 Beng. L. R. (O. J.) 63
(11) (1878) 3 Cal. 431.

By 24 & 25 Vic., c. 104, the High Courts were established and the Supreme Courts were abolished and by the section 11 it was provided as follows:

"Upon the Establishment of the said High Courts in the said Presidencies respectively all provisions then in force in India of Acts of Parliament, or of any Orders of Her Majesty in Council or Charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras, and Bombay respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively, so far as may be consistent with the Provisions of this Act, and the Letters Patent to be issued in pursuance thereof and subject to the Legislative Powers in relation to the matters aforesaid of the Governor General of India in Council."

The Insolvent Courts still continued to be separate tribunals and were not affected by the Act 23 & 24 Victoria except that provision was thereby made as to the officers who were to preside over them (*vide* clause 13 of the Secretary of State's Despatch of the 14th of May 1862. Page 44 of the Rules of the Bombay High Court).

Then by clause 17 of the Letters Patent of the 26th June 1862, which accompanied the despatch, it was provided as follows:

"And we do further ordain that the Court for Relief of Insolvent Debtors at Bombay shall be held before one of the Judges of the said High Court of Judicature at Bombay, and the said High Court, and any such Judges thereof shall have and exercise, whether within or without the Presidency of Bombay, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India."

On the 28th of December 1865 the Amended Letters Patent were granted, the purpose being to make further provision respecting constitution of the High Court, and the administration of justice thereby.

By the 18th clause it was provided as follows:

"And we do further ordain that the Court for Relief of Insolvent Debtors at Bombay shall be held before one of the Judges of the said Court of Judicature at Bombay, and the said High Court and any such Judge thereof, shall have and exercise, within the Presidency of Bombay, such powers and authorities with

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respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India."

Relying on the difference of language in this clause as contrasted with that which it superseded, it is argued before us for the respondent that the Insolvent Court's jurisdiction is now limited to the Presidency in the sense that no order can be made under section 26 against a person residing outside its limits.

If that be so, then it must follow that the Court cannot make an order vesting property outside the Presidency. But it is conceded that the Court has jurisdiction to make such an order, and undoubtedly this is the view that always has been accepted by the Courts.

But if clause 18 of the Amended Letters Patent has not for the purpose of a vesting order curtailed the jurisdiction of the Court it cannot have cut it down for the purposes of section 26, as obviously the mere *construction* as distinguished from the operation of that section cannot have been altered by anything contained in the Amended Letters Patent The first clause of the Amended Letters Patent does not require the construction for which the respondent contends, and I, therefore, hold that the Court has jurisdiction, but whether it should be exercised or not must be determined by the Commissioner when all the facts have been placed before him.

The result of my conclusion is that the order under appeal must be reversed with costs, including the costs occasioned before the Commissioner by the contention that he had no jurisdiction and the case must now go back to the Commissioner in order that it may be heard and determined by him.

Order reversed.

B. N. L.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

IN RE GOPAL SIDDESHWAR DESHPANDE.*

1908. *January* 16.

Criminal Procedure Code (Act V of 1898), section 195—Application for sanction to prosecute—Dismissal of the application for default—Appellate Court cannot grant sanction on appeal—Dismissal of application for default not permissible—Review of order not permissible under the Code.

An application was made by the Public Prosecutor of Belgaum to the Subordinate Judge of Gokak for sanction to prosecute G for offences committed in his Court. The Public Prosecutor failed to appear in the Court on the day and at the hour fixed for the hearing of the application. The Subordinate Judge dismissed the application as for default. On an application being made to review this order, the Subordinate Judge declined to do so. On appeal however the District Judge granted the sanction under section 195 of the Criminal Procedure Code (Act V of 1898).—

Held, that the District Judge had no jurisdiction to accord the sanction on appeal, under section 195 of the Criminal Procedure Code (Act V of 1898) inasmuch as there was no sanction given or refused by the Subordinate Judge. The only jurisdiction which the District Judge had under the circumstances was to revise the order passed by the Subordinate Judge dismissing the application as for default.

Held, further, that there was no provision in the Criminal Procedure Code (Act V of 1898) which warranted the Subordinate Judge in rejecting or dismissing the application of the Public Prosecutor because of his failure to appear at the time the application was called on for dismissal. The Subordinate Judge was bound to consider the application on its merits, even though the party who made it was not there to help the Court.

Held, also, that the Subordinate Judge had no power to review his order because the Criminal Procedure Code contained no provision giving jurisdiction to a Court to review orders passed under it.

THIS was an application made to revise the order passed by T. Walker, District Judge of Belgaum.

The facts were that the Public Prosecutor of Belgaum applied to the Subordinate-Judge at Gokak for sanction to prosecute Gopal Siddeshwar Deshpande for offences punishable under sections 463, 466 and 471 of the Indian Penal Code which were

* Criminal application for Revision No. 297 of 1907.

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alleged to have been committed in the course of a suit pending in his Court.

On the day and at the time fixed for hearing of the application the Public Prosecutor was not present. The application was therefore dismissed for default.

The Public Prosecutor later on applied to the Subordinate Judge for restoring his application to the file and deciding it on the merits, but it was rejected on the ground that the Subordinate Judge had no power to review his order under the Criminal Procedure Code (Act V of 1898).

The Public Prosecutor appealed to the District Judge who granted the sanction.

Gopal Siddeshwar applied to the High Court.

Robertson (with *C. A. Rele*) for the applicant.

M. B. Chaubal (Government Pleader) for the Crown.

CHANDAVARKAR, J.—This is an application for revision by this Court of the order of the District Judge of Belgaum granting sanction to the Public Prosecutor under section 195 of the Criminal Procedure Code for the prosecution of the petitioner for offences punishable under sections 463, 466 and 471, Indian Penal Code, or such other sections as may be applicable.

The sanction was accorded by the District Judge under the following circumstances. An application was made by the Public Prosecutor to the Subordinate Judge of Gokak in the first instance, for sanction, because the offence, in respect of which it was applied for was alleged to have been committed in the course of a suit in his Court. On the day and at the hour fixed for the hearing of that application the Public Prosecutor having failed to appear, the Subordinate Judge dismissed the application as for default. The Public Prosecutor appeared shortly after the dismissal and explained the circumstances under which he had been prevented from appearing in time to support the application. But the Subordinate Judge held that he had no power to review his order, because the Criminal Procedure Code contained no provision giving jurisdiction to a Court to review orders passed under it. So far the Subordinate Judge was right; but, on

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GOPAL SIDDESHWAR *In re.*

the other hand, it is equally the case that there is no provision in the Criminal Procedure Code which warranted the Subordinate Judge in rejecting or dismissing the application of the Public Prosecutor because of his failure to appear at the time the application was called on for dismissal. The Subordinate Judge was bound to consider the application on its merits, even though the party who made it was not there to help the Court.

After the Subordinate Judge had declined to review his order upon the ground mentioned above, the Public Prosecutor applied to the District Court and the District Court has accordingly accorded sanction. Now, the objection to that is, first, that the District Court has not gone into the details of the application, and, secondly, to give that Court jurisdiction under section 195, clause (*c*), there ought to have been a sanction given or refused by the Subordinate Judge. Here there was no sanction given or refused by the Subordinate Judge. The only jurisdiction which the District Judge had under the circumstances was to revise the order of the Subordinate Judge dismissing the application as for default.

We think, therefore, that for the reasons we have given, both the order of the District Judge and that of the Subordinate Judge ought to be set aside and the application made to the Subordinate Judge ought to be sent back to him with a direction that he should dispose of it according to law.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

NATHUBHAI MOTILAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI UJAM, WIFE OF BHAVANIDAS HARGOVANDAS (ORIGINAL DEFENDANT), RESPONDENT.*

Transfer of Property Act (IV of 1882), sections 67, 99 and 100—Execution of decree—Attachment—Application in execution.

Section 99 of the Transfer of Property Act (IV of 1882) contemplates attachment of property by a judgment creditor (even if he be a mortgagee), and he is entitled to attach the property by an application in execution of the decree.

* Second Appeal No. 505 of 1907.

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NATHUBHAI
v.
BAI UJAM.

The proper time to consider the applicability of section 99 of the Transfer of Property Act is when an application for sale is made in execution.

SECOND APPEAL from the decision of C. E. Palmer, acting District Judge of Broach, reversing the order passed by Manilal H. Vakil, Subordinate Judge of Ankleshvar, in an execution proceeding

The plaintiff, Nathubhai Motilal, obtained a decree against the defendant, Bai Ujam, for Rs 930 with respect to the value of certain ornaments, in Suit No. 323 of 1905, in the Court of the Subordinate Judge of Ankleshvar. The decree was passed on the 12th October 1906.

There was another suit between the parties, Suit No. 304 of 1905. Therein the plaintiff, Nathubhai, obtained a decree against the defendant, Bai Ujam, for Rs. 384. The said decree was passed on the 14th June 1906 and it gave to the plaintiff a lien over the defendant's immoveable property situate at Ankleshvar.

On the 22nd October 1906 the plaintiff presented a darkhast for the execution of his decree in Suit No. 323 of 1905 and prayed for the recovery of the decretal amount from the defendant in person and on her default to pay, by the sale of her immoveable property at Ankleshvar, subject to his lien on it under the decree in Suit No. 304 of 1905, and at Hansot. The Subordinate Judge, on the same day, passed an order directing the defendant to pay the amount and further directed that in case of default defendant's immoveable property be attached and prohibitory orders should issue on the 5th November 1906.

The defendant failed to pay the amount of the decree and her property was consequently ordered to be attached on the 5th November 1906. A proclamation of sale was subsequently issued and the property at Ankleshvar was sold on the 7th January 1907.

The defendant, in the meanwhile, appealed to the District Court against the order passed on the 5th November 1906 and got the confirmation of the sale stopped by obtaining an *ad interim* stay. The District Judge, on appeal, reversed the order of the Subordinate Judge and rejected the darkhast on the following ground :—

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NARAYANBHAI v. PAI HAKIM.

It is I think clear from sections 99, 100 and 67 of the Transfer of Property Act that in this case a suit under section 67 of the Transfer of Property Act is necessary and I therefore reverse the Subordinate Judge's order and reject the darkhast.

The plaintiff preferred a second appeal.

Gokuldas K. Parekh for the appellant (plaintiff).

There was no appearance for the respondent (defendant).

JENKINS, C. J :—This is an appeal from an order passed by the District Court of Broach on the 26th March 1907.

The acting District Judge described the appeal before him as being from the lower Court's order directing execution to proceed The order he intended to describe was one of the 22nd October 1906, and that was an order for attachment of property.

The learned Judge reversed this order for attachment and rejected this *darkhast.* The ground of his decision was that he thought sections 99 and 100 and section 67 of the Transfer of Property Act made it necessary that a suit should be brought under section 67. It may be a question as to whether or not one of the properties can be regarded as property in relation to which the applicant is a mortgagee within the meaning of section 99 of the Transfer of Property Act. But with that we have no concern at this stage. Even if he be a mortgagee he still is entitled to attach the property. Section 99 contemplates an attachment by him, for it provides that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under a mortgage or not *attaches* the mortgage property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. Therefore the learned Judge of the District Court was wrong in reversing the order for attachment and rejecting the *darkhast.*

When any application is made for bringing the property to sale, then will be the time to consider whether or not section 99 has any application.

The result is that we reverse the decree of the lower appellate Court and restore that of the Subordinate Judge.

The respondent must pay the costs throughout.

Decree reversed.

G. B. R.

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1908.

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UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL.

[illegible]LE OF CASES REPORTED.

ORIGINAL CIVIL.

APPELLATE CIVIL.

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Per CHANDAVARKAR, J. :—It is a matter of supreme importance and necessity that a case of fraud should not be the subject of a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars; and that if that condition is not [illegible] case of fraud, shall not be allowed to raise [illegible] is generally advisable, indeed, when fram[illegible] set forth in the issue itself a brief statem[illegible] refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations.

BALAJI *v.* GANGADHAR ... ... (1908) 32 Bom. 25

UNCONSCIONABLE BARGAIN—*Parties not on an equal footing—Defendant not aware of the nature of the transaction—Undue influence—Contract voidable—Contract Act (IX of 1872), secs. 16, 19A.*

See CONTRACT ACT ... ... 20[illegible]

UNDUE INFLUENCE—*Contract Act (IX of 1872), secs. 16, 19A—Unconscionable bargain—Parties not on an equal footing—Defendant not aware of the nature of the transaction—Contract voidable.*] To render a contract voidable on the [illegible]

There must be additional circumstances and when there is evidence of such additional circumstances they should be considered in the light of justice and equity. When the parties to the transaction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, when the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, all these are additional circumstances sufficient to make out a *primâ facie* case of undue influence so as to throw the onus on the lenders to disprove it.

CHATRING MOOLCHAND *v.* LIEUT. R. H. WHITCHURCH .. (1907) 32 Bom. 208

WILL—*Gift to charitable* [illegible] *—Cy-pres doctrine —Trust incapable of b*[illegible] *to useful and beneficial* [illegible] *Campden Charities* [illegible] circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the C[illegible] will carry o[illegible] ment es[illegible] such donor.

Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidence adduced before the Court.

In the matter of HORMASJI FRAMJI WARDEN ... (1907) 32 Bom. 214

It is I think clear from sections 99, 100 and 67 of the Transfer of Property Act that in this case a suit under section 67 of the Transfer of Property Act is necessary and I therefore reverse the Subordinate Judge's order and reject the darkhast.

The plaintiff preferred a second appeal.

Gokuldas K. Parekh for the appellant (plaintiff).

There was no appearance for the respondent (defendant).

JENKINS, C. J.:—This is an appeal from an order passed by the District Court of Broach on the 26th March 1907.

The acting District Judge described the appeal before him as being from the lower Court's order directing execution to proceed. The order he intended to describe was one of the 22nd October 1906, and that was an order for attachment of property.

The learned Judge reversed this order for attachment and rejected this *darkhast*. The ground of his decision was that he thought sections 99 and 100 and section 67 of the Transfer of Property Act made it necessary that a suit should be brought under section 67. It may be a question as to whether or not one of the properties can be regarded as property in relation to which the applicant is a mortgagee within the meaning of section 99 of the Transfer of Property Act. But with that we have no concern at this stage. Even if he be a mortgagee he still is entitled to attach the property. Section 99 contemplates an attachment by him; for it provides that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under a mortgage or not *attaches* the mortgage property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. Therefore the learned Judge of the District Court was wrong in reversing the order for attachment and rejecting the *darkhast*.

When any application is made for bringing the property to sale, then will be the time to consider whether or not section 99 has any application.

The result is that we reverse the decree of the lower appellate Court and restore that of the Subordinate Judge.

The respondent must pay the costs throughout.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1907.
September 5.

CHATRING MOOLCHAND & Co., PLAINTIFFS, *v.* LIEUTENANT R. H. WHITCHURCH, DEFENDANT.*

Contract Act (IX of 1872), sections 16, 19A—Unconscionable bargain—Parties not on an equal footing—Defendant not aware of the nature of the transaction—Undue influence—Contract voidable.

To render a contract voidable on the ground of undue influence there must be evidence of undue influence as required by section 16 of the Indian Contract Act. A high rate of interest which would induce a Court of equity to give relief against a bargain as being on that account hard and unconscionable is not by itself sufficient evidence of undue influence. There must be additional circumstances and when there is evidence of such additional circumstances they should be considered in the light of justice and equity. When the parties to the transaction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, when the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, all these are additional circumstances sufficient to make out a *primâ facie* case of undue influence so as to throw the onus on the lenders to disprove it.

THE plaintiffs, a firm of money-lenders, brought this suit against the defendant a Lieutenant in the Army to recover a sum due on a demand promissory note.

The defendant alleged (1) that he had not received the amount which the plaintiff alleged he had actually handed over to the defendant and (2) that the transaction was an unconscionable one falling under sections 16 and 19A of the Indian Contract Act.

On these points issues were raised and determined.

Jinnah (*Raikes* with him) for plaintiffs:—There is no evidence of an unconscionable bargain to satisfy section 16 of the Contract Act. See *Hari* v. *Ramji*[1] (judgment of Sir Lawrence Jenkins, C. J., at page 375). The Marwari could not dominate

* Original Suit No 214 of 1907.

(1) (1901) 25 Bom. 371 at p. 375.

Whitchurch a Military Officer. The defendant understood the terms of his bargain. Nor can section 19A apply. It cannot be said that defendant's consent was caused by undue influence.

Patel and *Lang* for defendant:—There is no need for direct evidence that plaintiff dominated the defendant. There has been an unfair advantage taken here by the plaintiff. We admit that general inadequacy of consideration is no defence but equity has exceptions. In all cases of reversioners and debtors in expectancy of money equity will relieve: see *Beynon* v. *Cook*(1). This doctrine is not confined to reversioners: see Denman, J., in *Nevill* v. *Snelling*(2). The case of *Hari* v. *Ramji*(3) was a case of two money-lenders who stood on an equal footing. The question of inadequacy of consideration depends on whether the parties stood on an equal footing or not. See Pollock's notes on section 16, clause 3 of the Contract Act. Undue influence is not required under the section. See illustration (*c*) to section 16.

We rely on section 19A. We do not ask to have the whole contract declared void but only to be relieved from the oppressive terms of the bargain. The defendant did not give his consent freely. He had no choice but to consent: Contract Act, section 25, Explanation II. See also Pollock and Mulla, page 133. All proceed on grounds laid down in *Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose*(4). *Lalli* v. *Ram Prasad*(5) was decided before the clause came into effect. See also *Madho Singh* v. *Kashi Ram*(6), *Balkishan Das* v. *Madan Lal*(7), *Poma Dongra* v. *William Gillespie*(8).

MACLEOD, J.:—The plaintiffs, a firm of money-lenders at Poona, have filed this suit as a summary suit against the defendant, a Lieutenant in the Indian Army, to recover the sum of Rs. 6,409-12 alleged to be due for principal and interest on a demand promissory note for Rs. 6,000 given to them by the defendant on the 14th September 1906. By an order of the 5th May 1907 the

(1) (1875) L. R. 10 Ch. 389.
(2) (1880) 15 Ch. D. 679.
(3) (1904) 28 Bom. 371 at p. 375.
(4) (1885) 12 Cal. 225 at p. 238.
(5) (1886) 9 All. 74 at p. 81.
(6) (1887) 9 All. 228.
(7) (1907) 29 All. 303.
(8) (1907) 31 Bom. 348.

1907.

CHATRING MOOLCHAND v. R. H. WHITCHURCH.

defendant was given liberty to defend the suit and his affidavit of the 1st May was taken as his written statement. The execution of the note is admitted and the questions I have to decide are (1) what were the true facts relating to the transactions between the parties, and (2) whether the defendant is entitled to relief under sections 16 and 19 of the Contract Act or otherwise.

It appears that on the 30th July the defendant, who was then stationed at Aurangabad, wrote to the plaintiffs asking them to come to him to arrange a loan. On the 1st August the plaintiffs replied asking for Rs. 10 to pay their travelling expenses. The original correspondence is not forthcoming but Ex. A is the draft of plaintiffs' letter of the 1st August, Ex. U is the entry crediting Rs. 10 to suspense account on the 14th August received for expenses from defendant, and Ex. W is the entry debiting the Rs. 10 to the suspense account on the 18th August when the money had been used for the journey to Aurangabad. Defendant said he did not remember asking the plaintiffs to come to Aurangabad, they had come to see Captain Oliphant who lived in the same bungalow with him and he took the opportunity to negotiate a loan. I think it more probable that the plaintiffs are right and that defendant at Captain Oliphant's suggestion wrote to the plaintiffs asking them to come to him. When the plaintiff Chatring Surajmal met the defendant the following arrangement was arrived at. The defendant was to sign a bond for Rs. 4,000 repayable by 32 monthly instalments of Rs. 125 The rate of interest was fixed at 1¾ per cent. per mensem and interest was to be deducted at this rate for 32 months. *Defendant was to hand over a policy on his life for* Rs. 5,000. The defendant says that the full interest was deducted amounting to Rs. 2,240 and that he only received Rs. 1,760 as follows: a cheque on Grindlay Groom and Company for Rs. 1,230, Rs. 30 in cash and a *chithi* for Rs. 500. As the plaintiffs had no stamped paper and as defendant had not got the policy with him it was arranged that the stamped paper should be sent from Poona and that when the plaintiff received the bond duly executed and the policy they would send the Rs. 500 in exchange for the *chithi*. On the other hand Chatring Surajmal says that defendant objected to so much being deducted for

interest as he wanted Rs. 2,500 in cash, and after some bargaining only Rs. 1,655 were deducted for interest and Rs. 615 were paid in cash instead of Rs. 30 as alleged by the defendant. [His Lordship after discussing the evidence in detail continued :]

I find therefore that the defendant received in cash Rs 1,760 on the bond for Rs. 4,000 of the 23rd August 1903 and Rs. 100 on the promissory note for Rs. 6,000.

The question then arises whether the defendant under the circumstances of the case is entitled to any relief from the liability he took upon himself by signing the note for Rs. 6,000.

In England Courts of Equity have always granted relief against unconscionable bargains · *Beynon* v. *Cook*[1]. This doctrine was discussed in *Kamini Sundari Chaodhrani* v. *Kali Prosunno Ghose*[2]; their Lordships of the Privy Council say at page 238 : "But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against" and after referring to *Beynon* v. *Cook*[1] the judgment proceeds: "This equitable doctrine appears to have a strong application to the facts of this case, where we have the borrower, a *purdanashin* lady; the lender her own *mukhtar*........., the security an ample one,......the interest... ... ..exorbitant and unconscionable." The Allahabad Court in *Lalli* v. *Ram Prasad*[3] and *Madho Singh* v. *Kashi Ram*[4] applied this doctrine. The question arises however since the Contract Act was amended by Act VI of 1899 whether section 16 as it now stands is exhaustive and displaces the principle of justice, equity and good conscience. The Allahabad Court has answered this question in the negative : *Kirpa Ram* v. *Sami-ud-din Ahmad Khan*[5] ; and in *Balkishan Das* v. *Madan Lal*[6] Knox, J., says: "From a careful consideration of these cases I am prepared to hold that even where no undue influence has been brought to bear on the man or any unfair advantage shown to

(1) (1875) L. R. 10 Ch. 389.
(2) (1885) 12 Cal. 225.
(3) (1886) 9 All. 74.
(4) (1887) 9 All. 228.
(5) (1903) 25 All. 284.
(6) (1907) 29 All. 303 at p. 307.

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have been taken of him, the bargain may still be an unconscionable one." This seems to go considerably further than the decision of the Privy Council in *Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose*(1). On the other hand in *Hari* v. *Ramji*(2) Jenkins, C. J., says: "If it be argued that section 16 is not exhaustive, and that it does not displace the principles of justice, equity and good conscience, then accepting, but without admitting, this argument as correct, we still think the defendant's position is no stronger." The judgment of the Privy Council in *Sundar Koer* v. *Sham Krishen*(3), the latest authority on the point, appears to show that section 16 is exhaustive. Their Lordships say at page 16: "There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money." In *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh*(4) their Lordships held the borrower was under a peculiar disability and the position of the parties was such that the lender was in a position to dominate his will. Urgent need of money will not place the parties in that position. I deduce from those two passages that there must be evidence of undue influence as required by section 16, and that a high rate of interest which would induce a Court of Equity to give relief against a bargain as being on that account hard and unconscionable, is not by itself sufficient evidence of undue influence, there must be additional circumstances. But I am prepared to hold that where there is evidence of such additional circumstances they should be considered in the light of justice and equity. Where the parties to the transaction are not on an equal footing, where it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, where the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, I consider that all these are additional circum-

(1) (1885) 12 Cal. 225.
(2) (1904) 28 Bom. 371 at p. 376.
(3) (1906) L. R. 34 I. A. 9.
(4) (1906) L. R. 33 I. A. 118.

stances sufficient to make out a *primâ facie* case of undue influence so as to throw the onus on the lender to disprove it. In this case the defendant, a Lieutenant in the Indian Army of the age of 24, and the plaintiffs were not on an equal footing. I am quite certain the defendant was not aware of the nature of the bargain he was agreeing to when he signed the bond for Rs. 4,000 and to demonstrate this it is advisable to show clearly the real nature of instalment bonds like the one in question. On the face of the bond the bargain appears to be that a loan for Rs. 4,000 is given at 21 per cent. per annum repayable by 32 instalments of Rs. 125 per mensem, interest deducted in advance. Assuming I am correct in finding that only Rs. 1,760 were actually advanced in cash the principal was repayable by Rs. 55 per mensem. As the defendant was to pay Rs. 125 at the end of the first month Rs. 55 represented principal and Rs. 70 interest, so that for the use of Rs. 55 for one month defendant paid interest at the rate of about 1524 per cent. per annum. As further instalments were paid of course the rate of interest would decrease down to about 47 per cent. for the last instalment, but I have roughly ascertained the average rate to be about 190 per cent per annum. When the bond was renewed by execution of the promissory note for Rs. 6,000, if I am right in finding that only Rs. 100 were paid in cash, not only was future interest added to the Rs. 3,000 due on the old bond but the defendant bound himself to pay interest on the whole amount of the note at 24 per cent. per annum. The defendant having established a *primâ facie* case of undue influence, I find that the plaintiffs have not satisfied the onus imposed upon them by section 16 to prove that the contract was not induced by undue influence, that there is evidence on consideration of all the circumstances of the case of undue influence and that therefore the defendant is entitled to relief under section 19A on the terms that he repay the amount actually advanced with interest at the rates agreed upon. Considering the security I do not think those rates require adjustment. There will therefore be a decree for the plaintiff for the amount found due on an account being taken as follows. The defendant will be debited with Rs. 1,760 with interest at 21 per cent per annum from the 17th August 1903 and Rs. 100 with interest at 24 per

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cent. from 14th September till judgment and will be credited with the instalments paid by him with interest from the respective dates of payment at 21 per cent. on Rs. 1,000 and 24 per cent. on Rs. 50 till judgment. Defendant to pay plaintiffs' costs up to 25th July 1907 and the costs which would have been properly incurred in taking a consent decree on the footing of defendant's letter. As to all other costs each party must pay their own.

Attorneys for plaintiff:—*Messrs. Captain & Vaidya.*

Attorneys for defendant:—*Messrs. Craigie, Lynch and Owen.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. *September* 16.

IN THE MATTER OF THE TRUSTEES' AND MORTGAGEES' POWERS ACT AND IN THE MATTER OF HORMUSJI FRAMJI WARDEN (DECEASED), HIRJIBHAI BOMANJI WARDEN AND ANOTHER (PETITIONERS).

Will—Gift to charitable purpose—Unnecessary and useless object—Cy-pres doctrine—Trust incapable of being carried out at testator's death—Diversion of funds to useful and beneficial purpose—Power of Court.

On the authority of *In re Campden Charities*(1) and of other cases it is clear that when under altered circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor.

Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidences adduced before the Court.

THE facts of this case appear as set out in the judgment.

Padsha for the petitioners.

(1) (1881) 18 Ch. D. 310.

Raikes (Acting Advocate General) in person as Advocate General.

DAVAR, J.: -Hormusji Framji Warden—a Parsi merchant of Bombay—died on the 25th of July 1885 having, previous to his death, executed his will on the 11th of November 1880. By his will the testator, after giving certain legacies, etc, provides as follows:—" My executors and trustees for the time being of this my will shall, if I have not done so myself in my lifetime, purchase an *eligible and commodious* site either at Girgaum or Grant Road without the Fort of Bombay, and shall erect a building and found thereon a *large commodious and comfortable* Hall or apartment for the purposes and uses of Parsis professing Zoroastrian Faith and shall name and style the same (after the name of my venerable deceased father Framji Bomanji Warden) 'The Framji Warden Hall'." For the purpose of building the hall and providing for it suitable furniture and utensils the testator sets apart a sum of Rs. 55,000. He provides a further sum of Rs. 10,000 for the upkeep and maintenance of the Hall. After the executors and trustees obtained probate of the will they invested a sum of Rs. 55,000 and another sum of Rs. 10,000 in 3½ per cent. Government Loan Notes and deposited the Paper in the Bank of Bombay for safe custody. The account of the first sum was headed "Framji Warden Hall Fund" and of the second sum was headed "Framji Hall Maintenance Fund." The reason for their doing so as given in their petition presented to the late Mr. Justice Tyabji on the 8th of October 1904 is that they found that the sum directed to be spent in building the Hall was found to be "wholly inadequate." In 1900 the trustees say they found a suitable piece of land at Grant Road measuring 4,500 square yards and this land they purchased for Rs. 61,000. This was done 15 years after the testator's death, during which period the funds were considerably augmented by accumulation of interest. As the plot was larger than was required for the Hall and as they got a good offer for a portion thereof they presented the petition I have referred to above and obtained the permission of the Court to sell 950 square yards at the rate of Rs. 18 per

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square yard. Later on they sold a small strip of land admeasuring 67 square yards at the rate of Rs. 31 a square yard. The present trustees now stand possessed of the remaining plot which measures 3,500 square yards approximately and is valued at the rate of over Rs. 30 a square yard. After deducting the price of the land that was purchased and adding the price of the portion of the land sold and the accumulated interest, the amount to the credit of the "Framji Warden Hall Fund" at present is about Rs. 48,500 and "The Framji Hall Maintenance Fund" with accumulated interest now amounts to about Rs. 19,500. The cost estimated of building a large commodious and comfortable Hall is somewhere between ninety thousand and a lac of rupees. The only fund available for building a Hall is Rs. 48,500.

On the 2nd of February 1907 the present trustees presented a petition to me in Chambers asking me to give my sanction to lease out the land to a Theatrical Company for eight years at Rs. 200 per month to enable the proprietor of the Company to erect a temporary theatre thereon. The trustees hoped that at the end of the eight years by the accumulation of interest on the funds in their hands and the rent which they would recover they would be able to provide a Hall such as the testator contemplated. Twenty-two years had clapsed between the date of the testator's death and this petition, and I was asked to accord my sanction to a scheme which would postpone giving effect to the testator's wishes for another eight years. The proposed scheme did not recommend itself to me and I referred the matter to the Advocate General asking him to favour the Court with his views and also asked the trustees of the Parsi Panchayet Properties and Funds to give me the benefit of their opinion as to the best means of carrying out the testator's wishes. When the matter came on again before me on the 23rd of March 1907 it was noticed that the Secretary to the Trustees of the Parsi Panchayet Funds in his letter stated that the trustees were of opinion that there were more Halls of the kind contemplated by the testator than the Parsi community required and deprecated the idea of providing another Hall, whereas he pointed out there were other requirements of the community such as hospitals, dispensaries, residences for the poor of the

community, which were very badly required by the Parsi community. I made no secret of my own view that a Hall in addition to those already existing would be a superfluity and Mr. Inverarity, who appeared for the petitioners, was also of opinion that, if practicable, the charity land and funds ought to be more beneficially utilized. He asked for time to consult his clients and communicate with the Advocate General on the subject and I allowed the matter to stand over. After the adjournment the matter appears to have been placed before the Advocate General, Mr. Basil Scott. On the 9th of April 1907 he wrote to the attorneys of the petitioners that in his opinion the present case was not one in which *primâ facie* the application of the doctrine *cy-pres* was called for. He goes on to say that he is not in a position to judge whether a Hall such as was contemplated by the settlor would be *useless* for the purposes of the Parsi community. He further says that in such matters it is for the Court to decide whether a case has arisen for the application of the doctrine of *cy-pres* or not and then he is good enough to remark that no one could be in a better position than this Court to come to a conclusion upon the point which is likely to give satisfaction to the Parsi community. The Advocate General concludes by saying that he would offer no opposition if this Court considered that the Funds should be applied *cy-pres* The trustees, after ascertaining that there would be no opposition from the Advocate General, put themselves in communication with the Secretary of the proposed Parsi General Hospital and after some negotiations the Committee of the Hospital agreed to accept the Charity Funds and utilize them in building and founding an Operation Hall to be called the Framji Warden Operation Hall for Parsis on certain terms and conditions which have proved acceptable to the trustees. They have set forth the whole of the scheme in the first petitioner's affidavit, affirmed on the 18th of July, 1907, to which affidavit is also annexed a copy of the Advocate General's letter to which I have referred above. On the application being made to me in Chambers to sanction this scheme I adjourned the matter into Court for the purpose of recording evidence and I directed copy of the first petitioner's affidavit to be furnished

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to the present Acting Advocate General inviting him to assist the Court by favouring me with his views when the matter should come on for argument. On the 10th of August evidence was taken and on the 12th of August I have recorded my findings on the evidence. (See my Note Book No. 7 of 1907, page 149.) The witnesses examined before me were men who represented the views of all sections of the Parsi community and had exceptional opportunities of knowing the wants and wishes of the community. Their evidence left no doubt in my mind that since the death of the testator the accommodation for the performance of marriages and Navjotes, and holding festivities on auspicious occasions or in connection with religious ceremonies such as Jasans and Ghambárs which had existed at the time he made his will and before he died has been considerably enlarged, improved and added to and now the Parsi community have already more Halls and places of the kind contemplated by the testator than the Parsis required. All the witnesses were unanimously of opinion that another Hall would be "*useless*" to the community and that moneys expended in erecting another such Hall would be moneys wholly wasted and thrown away The witnesses were also of opinion that a General Hospital for the exclusive use of the Parsis was a great want in the community, and I found on the evidence that the diversion of these charitable funds would materially help the proposed Hospital for which very nearly ten lacs are collected from or promised by the members of the Parsi community. Another thing which appeared abundantly clear from the facts placed before me is that a Hall such as the testator contemplated could not possibly be built for another ten years and if the vacant land is not let for those years it would take ten more years before the trustees would have enough accumulation in their hands to build the Hall. The contents of the Advocate General's letter raised doubts in my mind and although fully sympathising with the desire of the trustees and petitioners to divert the charitable property and funds to some purpose that would be both useful and beneficial to the community of the testator I was most anxious to do nothing that was not permitted by law and which might be a bad precedent

in the future. Those considerations actuated me in inviting Mr. Raikes, the present Acting Advocate General, to assist me at the argument of the application although Mr. Scott had signified that he would offer no opposition, and he was good enough to appear before me on the 24th of August last without incurring any costs and assisted me by placing before me his views on the subject and I feel indebted to him for this assistance.

The Acting Advocate General, without desiring to take up any attitude of hostility against the application of the trustees, contended that the *cy-pres* doctrine could only be resorted to when it was found *impossible* to carry out the original directions of the testator that as long as it was *possible* to give effect to the wishes of the testator the Court ought not to allow the charitable funds to be diverted into another channel—and so long as the charity directed by the will *could be carried out* the Court will insist that it should be so carried out and will not allow executors and trustees to say that the charity funds would be so much more beneficially utilized in establishing some charity other than that mentioned in the will of their testator. In support of these propositions the Advocate General has relied on three cases and it would be desirable to discuss them before proceeding further. Taking them in order of their dates the first of them is the case of *Attorney General* v. *The Earl of Mansfield*[1] decided in 1826. The point decided in this case was that where a school ought, under the instrument establishing it, to have been a Grammar School for instruction in classics the trustees would not be permitted to convert it into a school for teaching merely English writing and arithmetic. The report of the case is a very long one and I have carefully gone through it. The passage relied on by the Advocate General is at page 520 and forms part of the observations of the Lord Chancellor, Lord Eldon. He says:—

"But, in giving my judgment, I have no right to look at the propositions, on the one side or the other, as propositions, one of which promises to be more useful to the public than the other; because this Court has no jurisdiction to substitute a better

(1) (1826) 2 Russ. 501.

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proposition for a less useful one, but is bound to carry into execution the trusts of the property, as it finds those trusts to exist."

To understand the true meaning and import of this passage I think it is necessary to read it in the light of and in conjunction with the previous observations of the Lord Chancellor which appear at page 514 of the report. There he says:—

"There have been a great many cases in this Court, undoubtedly, in which when the particular things prescribed to be done could no longer be carried into effect, a change has been made; —a change approaching as nearly as might be, in what can be executed, to that which can no longer be executed; and such change has been sanctioned by the Court; but *if the original trusts are as capable of being executed at this day as at the time of their original creation,* the only question is, whether there was authority to change the nature of the trust?"

In connection with this case the only observation that need be made at present is that the original trust created by the will of Hormusji Framji Warden was wholly *incapable* of being carried out at the time of the death of testator as it is at this date twenty-two years after his death. With the sum of Rs. 55,000 the trustees were utterly unable to acquire a piece of land and build thereon a Hall as they are now unable to build "a large commodious and comfortable Hall" on the land they have acquired with the sum of only Rs. 48,500 which is now at their disposal for the purpose of building a Hall. At the end of another eight or ten years they say they *may* be able to build a Hall if they could succeed in letting the vacant land to some one. If they cannot get a tenant then twenty more years must elapse before they can carry out the testator's original intention.

The next case, cited by the Advocate General, is that of *Attorney General* v. *Boucherett*[1] decided in 1858. I do not think this case throws any very useful light on the question now before me. It seems that the settlor of the charity in question in the case by his will directed that Sir Edward

(1) (1858) 25 Beav. 116.

Aschough and his heirs for ever should be "Feoffees in trust and patrons and protectors of the school" which was the object of the charity established by the will. The Attorney General filed an information against the defendant who claimed to be the heir-at-law of Sir Edward Aschough and as such acted as the visitor and patron of the school—alleging that he was not the heir-at-law and praying that new trustees may be appointed and a scheme may be framed. It appears to have been argued before the Court that the charity would be more effectually and beneficially administered if new trustees were appointed and a scheme framed and the observations of the Master of Rolls are all directed against the suggestion that the charity should be administered by new trustees under a scheme and not by the heir-at-law of Sir Edward Aschough even though the defendant be such heir. The Master of Rolls in his judgment says at page 119:—"If, therefore, a founder of a charity directs that the heirs of a certain person shall be the trustees to administer the charity, so long as they perform the trusts properly, this Court cannot interfere with their discretion in that matter."

The Master of the Rolls undoubtedly does observe "that the Court cannot modify an existing trust"; but it must be remembered that in this case there was no question whatever of the original trusts being carried out and given effect to. In fact the trusts were carried out, the school was established, and no question whatever arose as to the application of the *cy-pres* doctrine and the only question was whether the Court could disregard the testator's express directions as to the management of the trust and appoint new trustees in the place of those appointed by the will. The Master of the Rolls when he speaks of modifying a trust merely refers to a change in its management. As I said before this case throws no light on the question now before me.

The last case referred to by the Advocate General is the case of *Philpott* v. *St. George's Hospital*[1] decided in 1859. This case and the case of *Re Ashton's Charity*[2], immediately following

(1) (1859) 27 Beav. 107. (2) (1859) 27 Beav. 115.

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and whether those circumstances have arisen in the present case. The matter before me is one of considerable importance and interest and I propose to consider the law on the subject as it is laid below in authoritative text books and as expounded in cases decided by the English Courts and our Court in Bombay.

To begin with, let me turn to a book which though elementary is not the less reliable therefore,—I mean Snell's Principles of Equity. At page 96 (13th edition) I find it stated as follows:—

"Where the literal execution of a specific charitable trust either originally is or afterwards becomes *inexpedient* or *impracticable*, the Court will execute the trust *cy-pres*." It will be noticed that the words used are "inexpedient" or "impracticable" and not "impossible."

In Ashburner's Principles of Equity at page 156 the subject is spoken of as under:—

"Where a gift to charity cannot be carried out in the manner and form intended by the donor, the gift does not necessarily fail . . . . but if the Court can collect from them an overriding general charitable intention, the trust property will be applied to *some* charitable purpose."

Here again there is no indication that the original object of the charity must become impossible of performance before the doctrine of *cy-pres* is called in aid of charity. All that is necessary is that the Court should be satisfied that the original object cannot be carried out in the manner and form intended by the donor.

In Tudor's Charitable Trusts (4th edition) in Chapter V, section 5, this subject is exhaustively treated. At page 141 it is said that the *cy-pres* doctrine would be applied in execution of a charitable trust if "the objects which are named are incapable of being effected"; and at page 142: "The application of the *cy-pres* principle is also required where the object named cannot be carried out."

This subject is also dealt with in Story's Equity Jurisprudence. At page 801 of the second English edition it is stated :—

"Where a charity is so given that there can be no objects, the Court will order a new scheme to execute it . . . and when the specified objects cease to exist, the Court will remodel the charity." At page 809 the learned author while discussing his subject says :—

"How Courts of Equity could arrive at any such conclusion, it is not easy to perceive, unless, indeed, where the nature of the gift necessarily led to the conclusion, that the object specified was a favourite, though not an exclusive, object of the donor."

So far as the English Courts are concerned there seems to be no dearth of decided cases Most of the cases, however, are cases between the Attorney General on the one hand and heirs-at-law or next-of-kin of the testator on the other, and the contest has always arisen in those cases by the contention of the latter that by reason of the charity having failed either by failure or want of objects or by the object being against law or incapable of being carried out the funds went back to the testator's estate. Amongst the older cases the case of *Moggridge* v. *Thackwell*,[1] decided in 1802, is a case of great authority. The Lord Chancellor, Lord Eldon, in a very elaborate and interesting judgment discusses the older authorities and says at page 69 :—

"I have no doubt, that cases much older than those I shall cite may be found, all of which appear to prove, that if the testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated, shall not destroy the charity ; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."

In no case so far as I have been able to ascertain has this proposition been doubted and dissented from but in subsequent cases the Courts have, if anything, given the most liberal construction to the exposition of the law laid down by Lord Eldon

(1) (1802) 7 Ves. Jun 36.

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as the result of his consideration of all the then existing authoritative decisions. In 1815 the same Lord Chancellor when delivering his judgment in *Mills* v. *Farmer*(1), referring to this case, says:—

"*Moggridge* v. *Thackwell* was determined entirely by the force of precedents much against my inclination."

In the case of *Mills* v. *Farmer*(1) the testator directed that the residue of his personal estate should be divided for certain charitable purposes mentioned by him and for certain other charitable purposes which he intended to mention later on. He made a codicil, mentioned therein no other charitable purpose and subsequently died never having indicated what other charitable purposes he had in his mind. The Court held that this was a disposition of the residue in favour of charity to be carried into execution by the Court and further held that the Court in executing the trust for charity will *have regard to the objects particularly pointed out by the testator.*

Another case of great interest and importance is the case of *Ironmongers' Company* v. *Attorney General.*(2) It arose out of a will made in 1723. Legal proceedings commenced in 1833 and did not end till 1841 when the case was finally decided by the House of Lords. The case is reported in its various stages first in 2 Mylne and Keen's Reports, p. 576: then in 2 Craig & Phillips' Reports at 208 and finally in 10 Clark and Finnelly's Reports, p. 908. The progress of this case through its various stages is most instructive reading. The testator in this case gave the income of the residue of his estate upon trust to use a moiety thereof "for the redemption of British Slaves in Turkey or Barbary"—and a quarter of the income "in establishing charity schools in the city and suburbs of London where education is according to Church of England." The remaining one-fourth of the income he gave to the Corporation of Iron Mongers upon certain trusts set out in the will. The moiety of the income set apart for the redemption of British Slaves in Turkey and Barbary accumulated for many years there being no British Slaves to redeem and eventually the

(1) (1815) 1 Mer. 55 at p. 95. (2) (1841) 10 Cl. & Fin. 908.

matter came before the Courts as to how that moiety of income was to be utilized. The House of Lords finally sanctioned a scheme whereby after setting aside a small portion of the funds for the future redemption of British Slaves if there should be any the whole of the accumulations and the income were directed to be utilized in establishing charity schools in England and Wales where education was according to the Church of England. The decision of the case in the House of Lords is most useful as a guide to the Courts as to where the Court should look and what the Court should look to in ascertaining the testator's charitable intentions and objects and to what objects the funds devoted to a charity which has failed for want of objects should be diverted. The Lord Chancellor Lord Lyndhurst (at page 927 10 Clark and Finnelly) says —

"Let us see what the tendency of his (testator's) charitable inclination was, how it manifested itself. When you find how it manifested itself in disposing of his property, dispose of the charity, the object of which has failed, in a way corresponding with that manifestation."

Referring to the scheme to divert the funds for redemption of slaves into establishing Charity Schools Lord Campbell at page 929 says:—

"Now I think that that is, if *cy-pres*, at an immense distance from the object that has failed, but still I think it would be by no means for the benefit of the charity to reverse this decree."

The next question that was discussed was whether the charity schools should be restricted to the area "city and suburbs of London" which the testator had indicated for the schools which he directed to be established by his will or whether the area for the schools to be established from the funds belonging to the charity that had failed should be more extended. The Lord Chancellor at page 933 says on this subject:

"It is obvious that one of the testator's great objects was education. We substitute something in lieu of the object which has failed. There was no limit of that to place; . . . . though we limit it to the Church of England, because it is clear he intended that education should be according to the principles of that church."

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That the Courts have not always insisted on being satisfied that the original charity has become impossible of performance before the funds could be diverted into other channels by the application of the *cy-pres* doctrine appears clearly from yet another case of *The Bishop of Hereford* v. *Adams* [1]. In that case the Court had before it a will which gave a bequest in trust for the poor inhabitants of several parishes . . . . to be applied either in money, provision, physic or clothes as the trustees think fit. The fund being very considerable portion of it was on the application of *cy-pres* doctrine used for objects and purposes not expressly pointed out by the will such as instruction and apprenticing of children. The testator's daughter Lady Twysden claimed that all the surplus income of the charitable fund that may remain over after the charitable objects mentioned in the will were fully carried out should be paid over to her. The Lord Chancellor speaking of Lady Twysden's claim says at page 329 :—

"As to giving the surplus to her, in the present state of the record it is impossible. . . . . Her claim must be on the ground, that the object aimed at is *impracticable in fact*, or, which is the same thing, in law; and, that, the property being undisposed of, she is entitled as next of kin." . . . . "Lady Twysden would have more to do, to get at the surplus, than to say, it could not be practically applied. . . . . If her claim was grounded, not upon the *impracticability*, but upon the *impolicy*, of the object, there will be much more difficulty, before she gets rid of the *cy-pres* doctrine."

The fund being more than sufficient for the original charitable purposes mentioned in the will, the Court sanctioned, in the end, a scheme whereby the surplus funds were directed to other objects such as instruction and apprenticing of children —Lord Eldon being of opinion that application of the surplus funds in the proposed scheme being "agreeable to the true construction of the testator's will." It is quite clear from a perusal of this judgment that the Court will call in the assistance of the *cy-pres* doctrine when it finds that the attainment of the

(1) (1802) 7 Ves. Jun. 324.

original objects is "*impracticable in fact*" or where it would be *impolitic* to carry out the original object literally.

The cases cited by the Advocate General and the cases discussed by me above are more or less ancient cases. In saying this I have not the least desire to minimise their importance. They are valuable guides to the Court considering the same question which was before the Courts deciding these cases. There are many cases on the same subject in more modern times but I do not propose to discuss any of the English cases decided in times more recent except one case because that one is recognised as the leading case on the subject and its importance and authority is never doubted or disputed in any Court. The case I refer to is *In re Campden Charities.*[1] This case is incorporated in Brett's Leading Cases in Modern Equity as a leading case on the subject of the application of *cy-pres* doctrine. Tudor in referring to the judgment of the Master of the Rolls in this case says at page 211 (4th edition):—

' The judgment of the Jessel M. R. in this case is so important and valuable that no apology is required for quoting it at length."

Before the Court of Appeal this case was most elaborately argued. The judgment of Sir George Jessel reversing the decision of Vice Chancellor Hall is a most lucid and masterly exposition of the principles which ought to govern the Court in deciding questions of the application of the doctrine of *cy-pres*. The Court had before it certain charities established under the respective wills of Viscount and Viscountess Campden made in the years 1629 and 1643 and another charity called "Cromwell's Gift" ascribed by tradition to Oliver Cromwell. The charities were originally directed to be applied "towards the better relief of the most poor and needy people of good life and conversation in the Parish of Kenington" and towards "apprenticing one poor boy or more of the Parish."

The income of the lands devoted to the charities increased enormously and the Charity Commissioners framed a scheme appropriating the income to the following purposes:—

(1) (1881) 18 Ch. D. 310.

(1) The relief of poor and deserving objects of the Parish in case of sudden accident, sickness or distress;

(2) Subscriptions to dispensaries and hospitals in the Parish;

(3) Annuities for deserving and necessitous persons;

(4) Advancement of the education of children attending elementary schools;

(5) Premiums for apprenticeships and outfits for poor boys of the Parish;

(6) Payments to encourage the continuance of scholars at public elementary schools above the age of eleven years;

(7) Exhibitions at higher places of education; and

(8) Providing lectures and elementary classes.

Power was also given by the scheme to make payments for the instructions of deaf and dumb children. Some of the Parishioners objected to the diversion of the funds for educational purposes.

The Court of Appeal overruling the decision of Vice Chancellor Hall sanctioned the scheme.

The Parishioners had originally petitioned for an alteration of the scheme framed by the Charity Commissioners on the grounds, first, that the scheme diverted to educational purposes a large portion of the income which was originally given for and had always been devoted to eleemosynary objects, and, secondly, *that there was no lack of the deserving objects of the charity ready to take under the old mode of applying the income.* It was argued that the scheme varied the nature of the charity which was only permissible where it was clear that the original purpose of the founders could not be attained or carried out and that that was not so in the case before the Court.

It is a noteworthy circumstance that in this case it was never argued that the original mode of expending the charitable funds had become impossible or that the charity had failed for want of objects. The Master of the Rolls in the course of his judgment in the Court of Appeal observes at page 324:—

"The whole of the circumstances of the place have changed . . . . Habits of society have changed, and not only men's ideas have

changed but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse which were prevalent at the times when these wills were made. The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the *cy-pres* doctrine, if there is nothing to prevent its application."

In another place the Master of the Rolls says in his judgment at page 323 :—

"In the first place, the scheme is made in pursuance of what is commonly known as the *cy-pres* doctrine, and, in cases like this, it is applied where, from lapse of time and change of circumstances, *it is no longer possible beneficially to apply* the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to *similar* purposes by different means."

In yet another place in his judgment the Master of the Rolls says at page 327 :—

"Ought we, sitting here simply to interpret the law, to hold ourselves bound by the words of the will to distribute this large sum of money in doles in this fashion? I think we ought not. As I said before, we must consider not only the change in amount, but the change in circumstances."

In the course of the discussion before me I drew the Advocate General's attention to this case and to some of the passages I have referred to above. The learned Counsel was not able to point to any more recent case where the correctness of the principles enunciated in the judgment of the Master of the Rolls have been doubted. It seems to me clear from this case as well as from the other cases that where under altered circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction the Court ought not to hesitate to give its sanction to a scheme which will carry out the

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charitable intentions of the donor to be gathered from the *instrument establishing the charity*, as nearly as possible to the original intentions of such donor.

There are not many reported Indian cases on the subject but the case of *Mayor of Lyons* v. *Advocate General of Bengal*[1] is a leading Indian case on the subject. The Mayor of Lyons as one of the residuary legatees applied for a share in a charity established for the release of prisoners in Calcutta which had failed for want of objects. The residue of the estate was in this instance bequeathed to other charities and it was amongst other things contended that there was no necessity for the application of the *cy-pres* doctrine as to the charity that failed when the residue of the testator's estate was bequeathed to other charities. The Calcutta High Court held " that the said charitable gift was an absolute charitable gift capable of being applied *cy-pres*; and that the petitioner, as one of the residuary legatees under the will, was not entitled to any of the funds appropriated to that gift." The Privy Council upheld the decision of the Calcutta High Court holding that the *cy-pres* doctrine is not invariably displaced when the residuary bequest is to charity. In delivering the judgment of the Privy Council Sir Montague Smith refers to the cases of *Moggridge* v. *Thackwell*[2] and *Mills* v. *Farmer*[3] which I have discussed in the earlier part of my judgment. Referring to the doctrine of *cy-pres* he says at page 53: "There is no doubt that although strongly disapproved of by Lord Eldon, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it." In this case by the application of the *cy-pres* doctrine the funds to the charity that failed were applied to other objects although the testator had devoted the whole of his residue to certain other objects of charity—those other objects being different from the objects to which the funds were diverted by the Calcutta Court.

Let me now turn to our Courts in Bombay and examine what my predecessors and colleagues have been doing when questions

(1) (1876) L. R. 3 I. A. 33. (2) (1802) 7 Ves. Jun. 36.
(3) (1815) 1 Mer. 99.

almost exactly the same as the question now before me were before them.

In 1901 Fazulbhai Visram and others filed a suit against the Advocate General of Bombay and took out an Originating Summons. The suit was numbered 608 of 1901. The plaintiffs stated in their plaint that they were the executors and trustees of the will of one Haji Allarakhia Nathoo—that by the 14th clause of the testator's will they were directed to purchase a piece of land and build thereon a mosque for the use of Khojas and Mahomedans of the Shia Isna Ashre persuation—that for that purpose the testator had set apart Rs. 60,000—that after the testator's death a mosque for the use of this sect of Khojas and Mahomedans was built and that there was no need in Bombay for another mosque for the members of the Isna Asari sect. They propose certain alternative schemes for using their testator's moneys for purposes other than those mentioned in the will but akin to those purposes. It is very important to note the language of the questions submitted to the Court for its consideration.

Question (1):—Whether it is *necessary, desirable or proper* that the directions contained in clause 14 of the will of Haji Allarakhia Nathoo deceased in the plaint referred to should be strictly carried out.

Question (2):—Whether the literal execution of the trusts in the said clause fourteen contained has not *now become inexpedient* and the same ought not to be executed *cy-pres*.

The summons was argued before the late Mr. Justice Starling. *On the 7th of October 1901 he recorded evidence which was* merely confirmatory of the statements in the plaint and on the following day he made his order. The language of the order again is worth noting:

"Declare that it is *impossible* and *inexpedient* in the existing state of circumstances to carry out the charitable trusts provided for in the clause 14 of the will of Haji Allarakhia Nathoo bearing date the 24th of November 1898."

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The decree drawn up in terms of the order runs as follows:—

This Court doth declare that it is *impossible* and *inexpedient* to carry out the charitable trusts provided for in the 14th clause of the will of Haji Allarakhia Nathoo dated the 24th of November 1898 in the manner provided in the said clause.

The decree then sanctions a scheme for the diversion of the charitable funds to other objects akin to the one specifically mentioned by the testator in his will.

I have carefully gone through the proceedings of this case. Nowhere, either in the plaint, in the questions, or in the evidence, is it suggested that the building of the mosque such as the testator had desired his executors and trustees to build, was impossible. It was nowhere suggested either that the funds were inadequate or that it was not possible for any other reason to erect a mosque as directed by the will. All that was urged before the Court by the plaintiffs was that in the present circumstances it was *inexpedient* to build a mosque as one had already been built since the date the testator gave his directions in the will and that therefore it was not *necessary, desirable,* and *proper* that the directions in the will should be strictly carried out. In spite of this Mr. Justice Starling by his order and decree declares that it is *impossible* and *inexpedient* to carry out the charitable trusts provided for in the will of the donor. Now in what sense can the learned Judge have used the word impossible? It would I think be impossible for any one to say that the learned Judge could have meant solemnly to declare from the Bench of the High Court that it was impossible in its strictly limited and literal sense to build a mosque in Bombay.

It seems to me to be quite clear that the learned Judge used the word impossible in the more extended and liberal sense and meaning which I have discussed in the earlier part of the judgment and it is equally clear to me that he gave his sanction to the scheme on the ground that a second mosque in Bombay for the Isna Asari sect of Khojas and Mahomedans was not necessary, that it would be at most a superfluous if not a useless institution and that it was not expedient or desirable to compel

the trustees to expend the trust funds in carrying out an object which was no longer useful or beneficial to the section of the community for whose benefit the testator had set apart his moneys.

Let me consider another case which came before one of our own Courts.

On the 12th of October 1905 Nusserwanji Cowasji Shroff and another filed a suit against the Advocate General of Bombay and various other parties, which suit was numbered 758 of 1905. The plaint stated that one Cowasji Hormusji Shroff by his will dated the 11th of July 1872 gave and bequeathed to his executors his immoveable property situated at Khetwady Cross Road and known as Hormuzd Bag in trust to be used as charitable property in the same manner as it had been used during his life-time and he set apart out of his estate Rs. 2,000 which he directed should be invested in Government Paper and the income whereof was directed to be used in keeping the premises in repairs. Hormuzd Bag was allowed to be used by the members of the Parsi Community for the purpose of celebrating marriage and thread ceremonies and for the purpose of holding Jasan and Ghambár feasts, etc. Paragraph 20 of the plaint is as follows:—

"The plaintiffs say that it is *not desirable* to adhere strictly to the original objects to which the said premises and the sáid Government Promissory Notes were dedicated or to utilize the same for the said public charitable purposes for which they were originally utilized inasmuch as there is no demand or need for using the same for such purposes and submit that the said premises and notes should be appropriated *cy-pres* to some other charitable purposes for the benefit of members of the Parsi Community in Bombay."

By prayer (*f*) of the plaint the plaintiff prayed:—

"That a scheme be framed for the application *cy-pres* of the said premises and the said Government Promissory Notes . . . . to public charitable purposes for the benefit of the members of the Parsi Community in Bombay."

Mr. Basil Scott, the Advocate General, has endorsed his consent to the institution of the suit—at foot of the plaint. The

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suit first came on for hearing on the 19th of June 1906 before Mr. Justice Scott who was then on the Bench and the plaintiff's counsel were the then and present Acting Advocate General Mr. Raikes and myself. The first defendant, the Advocate General, appeared also by counsel. Formal evidence was recorded of the first plaintiff who stated that the premises were not required for the purposes for which they were originally used, namely, the performance of marriages and Navjotes and the holding of feasts in connection with religious ceremonies and expressed a desire that the charitable property should be made over to the Society for providing cheap residences for poor Parsis. Mr. Justice Scott allowed the case to stand over to ascertain if the Society would accept the proposed gift on the terms proposed by the first plaintiff. The case was heard again on the 25th when Mr. Marzban, the Honorary Secretary of the aforesaid Society, was examined and the learned Judge made this order:—

"Order sanctioning the transfer of the Hormuzd Bag to the trustees of the Garib Zarthosti Rehtan Fund subject to the terms and conditions agreed to by the Secretary."

This case reached another stage to which I will presently refer but before I do this I must notice that the charitable bequest in this case was identically the same as the bequest in the case now before me. Mr. Scott, who has been for many years the Advocate General of Bombay, approved of the filing of the plaint with the statement and the prayer I have quoted above. By a curious coincidence he was the Judge who heard the suit. The present Acting Advocate General Mr. Raikes was associated with me in supporting the plaintiff's case and the counsel who appeared for him gave his consent to the proceedings and the order of the Court. Where was the impossibility of continuing the maintenance of the Hormuzd Bag as a public place for the performance of marriages and Navjotes and for the holding of Ghambár and Jasan Feasts? The only ground on which the sanction of the Court was given was that owing to the existence of other and better places for the same purpose these premises were not now in much request and the charity had become more or less useless and that

there were other objects to which the charitable properties could be diverted with benefit to the community for whose good the donor had established this charity by his will.

Now let us look at the second stage of this case and see if the aspect of the affairs is altered by what subsequently transpired. The decree was made on the assumption that none of the members of the donor's family objected to the diversion of the charitable property as proposed by the plaintiff. In fact the first plaintiff stated to the Court that so far as he knew none of the defendants objected. After the decree some of the defendants came forward and objected to the property passing out of the family and one of them offered to give Rs. 8,000 out of his own pocket, for the purpose of erecting residences for poor Parsis on the charitable property. On the 2nd August 1906 the decree was by consent of the plaintiffs set aside and the following order was made by Mr. Justice Scott :—

"By consent refer to the Commissioner to frame a scheme for the future administration of the Hormuzd Bag having regard to the wishes of the settlor and to report *how far the same can be given effect to at the present time and if they cannot be given effect to either wholly or partially* how the property can be *most advantageously* administered *cy-pres* and in reporting let the Commissioner take into consideration the offer of the 4th defendant to erect on the property at a cost of Rs. 8,000 dwellings for the poor Parsis."

Now in this case the first thing to remember is that the property had been for years both during the testator's life-time and after his death in 1872 used for the purposes of performing marriages and Navjotes and for holding Jasan and Ghambár feasts. The evidence was that in later years it was very little if at all used for these purposes for which it was set apart. From the plaint and the first plaintiff's evidence I gather that previous to 1897 the use of Hormuzd Bag was requisitioned on about 50 or 52 days in the year by the Parsi Community—that in 1897 the trustees allowed the Parsi Panchayat to use the property for the residence of poor Parsis who had to vacate their premises owing to the prevalence of plague in their houses

or neighbourhood—that in 1901 the premises were no longer required for segregation purposes and that from that date to the date of the suit the premises had scarcely ever been requisitioned for the uses and purposes for which they were set apart. Can it be said that the objects for which this property had been dedicated had wholly failed and that it had become impossible to give effect to the testator's original directions? The facts in this case and in the one before me, are precisely the same. In both cases the original gift was for the purposes of the performance of marriages, Navjotes, Jasans, Ghambárs etc. In the middle of 1906 the Court accepted the more formal evidence of the plaintiff that the property could no longer be used *beneficially* for the purposes named by the testator—that it had become useless so far as those purposes were concerned. The Court in the first instance on those allegations sanctioned the transfer of the whole of the trust premises to an existing Parsi charitable institution and on the objection of some of the members of the family remodelled its decree accepting a donation of Rs. 8,000 from one of the parties to the suit—not it must be remembered in furtherance of the original charity—but with the express purpose of converting a part of the premises into quite a different charity. I can see nothing whatever to distinguish this case from the one I am now considering and in my opinion this case is a precedent of great authority from the fact that the presiding Judge had been for many years the Advocate General of Bombay and as such had jealously safeguarded all charities and had achieved a reputation for being most careful and scrupulous in all cases of charity which came before him in his capacity as Advocate General.

Let me now consider another case which came on before the Bombay High Court before another Judge. On the 22nd of March 1906 Dady Nusserwanji Dady filed a suit against the Advocate General and took out an Originating Summons The suit is numbered 194 of 1906. The plaint states that in 1810 one "Ardesir Dady a Parsi . . . during his life-time devoted a piece of land with a building thereon situated at Mahaluxmi for the use of the Parsi Community as a Parab, that is to say, a place where the members of the Parsi Community could

enjoy rest and could get water free of charge." It is unnecessary to deal in detail with what happened to the Parab. It is sufficient to say that the premises at Mahaluxmi were in 1868 acquired by the Municipality and other premises were substituted and used as a Parab till 1883 when Government acquired the premises under the Land Acquisition Act. The funds belonging to the charity in the hands of the plaintiff at the date of the filing of the suit consisted of 3½ per cent. Government Loan Notes of the nominal value of Rs. 17,500. The plaintiff in his plaint suggests that the funds may be advantageously made over to the trustees of the fund for providing cheap residences for poor Parsis of which fund Khan Bahadur Mancherji Marzban is the Honorary Secretary, in order that the funds may be utilized for erecting a building for residence of poor Parsis a part of which may be used as a Parab.

Paragraph 21 of the plaint runs as follows:—

"The plaintiff is of opinion that a Parab *will not serve any useful* purpose *in these days* and has suggested above the use of a part of the building as a Parab for the sole reason that as the original object of the charity was a Parab—the inclusion of a Parab might be considered necessary by this Honourable Court in sanctioning the above scheme. Should this Honourable Court be of opinion that part of the premises must be used as a Parab the plaintiff will abide by the directions of the Court in that behalf."

The questions submitted to the Court were:—

(1) Whether under the circumstances mentioned in the plaint, the plaintiff can hand over the funds now in his hands representing the Parab charity mentioned in the plaint to the trustees of the fund for providing residences for poor Parsis on the said trustees agreeing or undertaking to apply the said funds towards building and maintaining therefrom residential quarters for the poor and deserving members of the Parsi community at a small or nominal rent to be applied in keeping the premises under good repair

(2) Whether the plaintiff should stipulate, upon handing over the said funds to the said trustees of the fund for provid-

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ing residences for poor Parsis, that a portion of the building to be erected out of such funds should be set apart for use as a Parab by members of the Parsi community."

The summons came on for argument before Mr. Justice Russell on the 6th of April, 1906. From the learned Judge's notes I find that Mr. Raikes, the Acting Advocate General, appeared for the plaintiff. The first defendant, the Advocate General, was not represented by Counsel at the hearing and the second defendant, who was a formal party being the executrix of a deceased trustee, did not appear at the hearing. The answer to the first question is "Yes" and to the second question "No."

The decree, after declaring that under the circumstances mentioned in the plaint the plaintiff can hand over the funds in his hands representing the Parab charity to the trustees of the funds for providing residences for poor Parsis, goes on to say:

"And this Court doth further declare that the plaintiff *need not* stipulate, upon handing over the said funds to the said trustees, that a portion of the building to be erected out of such funds shall be set apart for use as a Parab by members of the Parsi community."

Now, can it be suggested that it was impossible to erect and maintain a Parab in the year 1906? Many Parabs existed in former times. They were very small places either standing by themselves or forming a part of larger buildings where fresh water was supplied in a couple of *handas* for washing purposes and a *matla* (earthen pot) for drinking purposes. The funds in the hands of the trustees were quite ample to maintain a good Parab. That it was quite possible to maintain a Parab at the expenditure of only a small portion of the funds is quite clear from the plaint itself, for the plaintiff asks the Court to say if he should stipulate for the use of a portion of the premises to be erected from this fund as a Parab and the Court's answer to that is "No, you need not." Every argument that was urged before me in the case now I am deciding could well have been ugred with equal emphasis by the Advocate General in the case before Mr. Justice Russell, but there was no opposition whatever. I confess I fail to see any distinction between that case and

this. I can quite understand the propriety of Mr. Justice Russell's answers. They are in perfect accord with sound common sense and I think they are in perfect harmony with the law governing the application of the *cy-pres* doctrine prevailing in our times. Although not only was it possible but it was quite easy to erect and maintain a Parab it would have been more or less a useless charity. Although we do not all get fresh water free of charge in Bombay, still the supply of fresh water in Bombay is now so abundant and the means of locomotion by the establishment and growth of railways and tramways have increased and cheapened so much that it would be a very rare occasion when a Parsi wayfarer would be in need of a place to rest and refresh himself by a wash and a drink of water. If the Court had withheld its sanction it would have been tantamount to compelling the trustees to waste the funds of charity in creating and maintaining a most useless institution, whereas the Court's order has helped a charity which supplies a most crying and urgent need for the poor of the community for whose benefit the charity was originally established.

There is another case to which I must shortly refer. Mr. Nanu Narayan Kothare, as the sole surviving executor of the will of Chanda Ramji, filed a suit against the Advocate General of Bombay and took out an originating summons. The suit was numbered 21 of 1907, and is reported in 9 Bombay Law Reporter, page 370. The testator had in this case made large gifts to his Thakoreji for the purpose of installing the idol in splendour and performing its Nek Sewa. The Nek Sewa consisted of placing food before the idol and then distributing the same amongst the poor. After setting aside a sum of *money for providing a home where the Thakoreji may sit in* splendour and another sum from the income whereof the executor thought the Nek Sewa could be efficiently performed, there was a very large sum still available which the plaintiff proposed in the suit should be more beneficially employed by providing benevolent and useful institutions for the benefit of the community to which the testator belonged. The summons was argued before me in January, 1907. Mr. Basil Scott, the Advocate General, told me that he, as representing charity, had no objection to the proposal—the surplus funds were allowed to

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be utilized in giving a large donation to a fund for providing a charitable dispensary for the use of the Cutchi Lohana community—for providing cheap residential quarters for the poor of the same community and for establishing a Female High School for *all Hindu girls* in Bombay. I refer to this case for the purpose of drawing special attention to the attitude of the Advocate General. We have enough poor Hindus in Bombay to absorb the income of a much larger sum than was available for the Nek Sewa of the idol by which is merely meant distribution of food amongst the poor. This charity was by no means entirely useless—though indiscriminate increase of this charity may lead to idleness and other undesirable results. My mind was not free from doubt when the matter was argued before me and Mr. Inverarity pressed me to sanction the proposal. I was very much influenced in eventually according my sanction to the plaintiff's scheme by the fact that the Advocate General, who is the responsible officer whose duty it is to protect and preserve all charities, had nothing to say against the scheme proposed by the plaintiff.

There are other cases decided by our Courts in Bombay similar to those I have discussed above, but I do not think any useful purpose would be served by discussing them. The Advocate General, when in response to my invitation he discussed this question before me, said he thought the present application ought not to be granted as it might form a dangerous precedent. I do not think it is a question of precedent at all. Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidence adduced before the Court. If it was a question of precedents, then in the Bombay cases I have referred to there are precedents already and in following in the footsteps of Judges like the late Mr. Justice Starling, Mr. Justice Russell and Mr. Justice Scott I think I would be treading on very safe ground.

Another argument urged before me was this. If people charitably inclined come to know that the Courts, after their death, disregarded their wishes and instead of carrying out the charities which they may establish in their lifetime or by their

will, utilized the charity funds for other purposes they would be deterred from giving effect to their charitable inclinations. I think this is erroneous and there is another view which commends itself to my mind. It seems to me that all right-minded charitably inclined people would be encouraged to devote a portion of their wealth to the charities that recommend themselves most to their minds more readily, if they knew that in case after their deaths a particular charity established by them ceased to be useful or became incapable of being continued with any benefit to the objects of his benefaction, that when, in the words of Sir George Jessell, "it was no longer possible beneficially to apply the property in the exact way in which they have directed it to be applied," that in those events the Courts would sanction the employment of the funds set apart by them to other purposes akin to their own but of *real* use and benefit to the objects of their benefaction. We are living in progressive times. Our surroundings, circumstances, and modes of thought, are undergoing changes. What may appear to be crying wants to-day may be useless superfluities in the future. If I may claim to read the Indian mind I would be inclined to say that it would be a great encouragement to a man desiring to establish a charity to feel that if in the future the charity, which now recommends itself to him as most beneficial, became useless and could no longer enure to the benefits of the objects of his benefaction, that then the Courts would give sanction to utilize the property of the charity to such objects akin to his own which would conduce to the real benefit of the parties and communities whom he desires to assist by his charitable donation. He would, in my opinion, be more inclined to devote his property to charity if he felt that the Courts in India would be always alert to see that in the future under altered circumstances his funds would not be wasted on purposes that may become useless and cease to be beneficially employed.

Now what are the circumstances in this case under which the trustees of the late Mr. Hormusji Framji Warden are asking me to give my sanction to their proposal? For twenty-two years they have been unable to give effect to the testator's wishes. It is doubtful if they can do so at the end of eight more years. They

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may be able to build a Hall for the Parsis *then* if they can get a tenant for their vacant land. If not, they must wait for another twenty years from now. Reading the will of the testator in connection with this charitable bequest I find that there were two very clearly defined objects predominating in his mind when he set apart a part of his wealth for the establishment of this charity. One was to perpetuate the name of his late father Framji Warden, the other was to provide an institution which would be useful to the members of his community—Parsis professing Zoroastrian religion—and a Hall, he thought when making his will, would answer that object. On the clearest possible evidence I have found that a Hall such as he contemplated would be wholly useless to Parsi Zorastrians at the present day.

Would it be reasonable of me by refusing my sanction to compel the trustees to erect a useless building thirty or forty years after the testator's death—a building which nobody wants and which would at best be rarely used? Would such a building serve the purpose of perpetuating the name of the testator's father? I think I would be defeating both the objects of the testator and would be acting in a most unreasonable manner if I withheld my sanction.

Having come to this conclusion, before I give my sanction it is my duty to consider whether the proposal now placed before me is one that is near enough to the original object of the testator. It is proposed to erect in a conspicuous part of the site of the proposed Parsi General Hospital an Operation Theatre and it is to be named The Framji Warden Operation Theatre for Parsis—a tablet is to be affixed to the building commemorating the names of the testator and his father—a marble Medallion of the donor is to be fixed in a conspicuous part of the building—one of the trustees under the testator's will is to be a member of the Executive and General Committees of the Hospital and that during the lifetime of one of the present trustees and his successor for fifty years after his death, is to have a right of nominating every year three Parsi patients free of charge. The other details it is not necessary to set out. In my opinion giving effect to these proposals will give effect to

the testator's wishes as near as can be done. It will perpetuate not only the name of the testator's father but of the testator himself and that in a more marked manner and in connection with a truly charitable and benevolent institution. The testator's object was to provide a Hall for the use of such members of the Parsi community who were not owners or occupiers of large and commodious houses and bungalows and who cannot perform marriage ceremonies and give feasts at their own residences. Such members are the middle class and the poor of the community. Those are the members of the community to whom the proposed Operation Theatre will be of infinitely greater value than an additional Hall of festivities. A man or woman leaving the Operation Theatre after being successfully cured of a disease will remember the names of the testator and his father with much greater reverence and gratitude than a man leaving a festive Hall after a dinner.

It must be remembered that I am not in this instance administering Charity Funds, nor have I got the disposal of them. In giving my sanction to the proposed scheme I ought not to be understood to say that the scheme proposed is one that is most beneficial or most urgently needed for the community. All I say is—that it is as near the original scheme as is possible under the circumstances and effectively carries out the charitable intentions of the donor.

Before concluding I feel it my duty to say that the trustees of the will of Mr Hormusji Framji Warden have throughout acted in the best interests of the charity and the present trustees are entitled to the gratitude of the Parsi community for having come forward with the present proposal.

The Advocate General, in the course of his address, asked me to invite him to appeal if my judgment was against him. To a Judge it is always a source of great satisfaction to feel that his judgments are subject to appeal In cases of doubt or difficulty I always feel gratified when I hear that an appeal has been filed; but I do not think it is right for a Judge to invite a party to file an appeal and I am all the more disinclined to comply with the Advocate General's wishes in this case as after I heard him and carefully considered his arguments and studied

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the cases on the subject I have no doubt in my mind as to what order it is my duty to make in this case. Such an invitation to appeal would, besides, be liable to be misunderstood—more especially where charity funds are concerned—as an invitation to unnecessary litigation, the effect of which would be to tax *charity funds with more costs. If the learned Advocate General,* after considering the previous cases in our Courts in Bombay to which I have referred and to other cases which I have no doubt can easily be found by searching the records of the Prothonotary's office or his own office, still feels that I am in error in making the order I am going to make in this case, he would of course be at liberty to appeal and I feel certain no one will misunderstand his action which can only be dictated by a sense of the duty he has to perform as the Advocate General of Bombay.

In deference to the wishes of the donor's family I authorize the trustees to set apart Rs. 10,000 for the benefit of the blind and the maimed Parsis and for destitute Iranees as proposed in paragraph 3 of Mr. Hirjibhoy Bomanji Warden's affidavit of the 18th of July, 1907.

I do sanction the whole of the scheme as put forward before me in the same affidavit except that I do not approve of payments by instalments as proposed in clause (*h*) of the scheme as set out in paragraph 5 of the same affidavit. This mode of payment is likely to delay and hamper the construction of the Operation Theatre. Mr. Hirjibhoy will be a member of the Executive Committee and therefore he will have a voice in the matter and the payment of the amount at once will expedite the erection of the theatre and the commencement of the work of charity.

The trustees to sell the charity land either by public auction or private sale within three months from this date.

All the costs of the petitioners taxed between attorney and client to be retained by them out of the charitable funds in their possession. The Advocate General has been good enough to incur no costs and it is not necessary to provide for his costs.

I reserve to the parties interested liberty to apply.

Attorneys for petitioners: *Messrs. Jamshedji, Rustamji and Devidas.*

B. N. L.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor

1907. *December* 11.

ARDESHIR SORABSHA MOOS (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHUSHALDAS GOKULDAS TRADING AS CHUNILAL KHUSHALDAS AND CO. (ORIGINAL DEFENDANT), RESPONDENT.*

Negotiable Instruments Act (XXVI of 1881), sections 7, 32, 53, 64, 115, 134—Bills of exchange drawn on defendant and endorsed over to plaintiff by the Banks in whose favour they were drawn—Failure of defendant to pay—Suits to recover on the bills—Plaintiff's capacity—Holder deriving title from holder in due course—Bills accepted need not be dishonoured and protested—Acceptor liable at maturity—Assent not signed on the bills but on copies—Assent not valid.

The plaintiff sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff by the Banks in whose favour they were drawn. The suits were dismissed on the grounds that (1) the suits were defective in form inasmuch as the plaintiff was suing as agent without disclosing his principals and (2) the suits were not competent as the bills had never been dishonoured and protested.

Held (1) that the bills were endorsed over to the plaintiff by the Banks in whose favour they were drawn, so that he was a holder deriving title from holders in due course, and as such he was competent to sue under section 53 of the Negotiable Instruments Act (XXVI of 1881)

Held further (2) that the bills were made payable at Bombay. Therefore under sections 134 and 32 of the Act the acceptor became liable at the maturity of the bills and the suits were not bad because the bills had not been dishonoured and protested. Section 115 of the Act merely enacts that a bill is not dishonoured until it has been dishonoured by the drawee in case of need where such drawee is named in the bill Presentment is not necessary to charge the acceptor. The acceptor is the principal debtor and his liability is independent of the presentment.

The acceptance having been signed on the copies of the bills and not upon the bills or upon one of their parts in accordance with section 7 of the Act,

Held that a material requirement of law had been omitted with the result that there was no valid acceptance

SECOND appeals from the decrees of R Knight, District Judge of Ahmedabad, confirming the decrees of Vadilal T. Parikh, Joint

* Second appeals Nos. 15, 177, 178 and 179 of 1907.

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ARDESHIR SORABSHA v. KHUSHALDAS.

Subordinate Judge, in original suits Nos. 387, 389 and 390, and reversing that in suit No. 388 of 1903.

The facts of the case were as follows :—

One Khushaldas Gokuldas, a shroff in a Branch of the Bank of Bombay at Ahmedabad, and one Ardeshir Sorabsha Moos, a merchant at Bombay, occupying among other positions that of agent to Fracis, Times and Co., a London Firm of Cigarette-dealers, were personal friends. In November 1898 Ardeshir persuaded Khushaldas to give his principals an order for large consignments of cigarettes which were to be disposed of at Bombay and Ahmedabad. Ardeshir was to look after the sales at Bombay and Khushaldas after those in Ahmedabad. Khushaldas, therefore, signed an indent ordering sixty cases, each of 50,000 cigarettes to be shipped in twelve lots of five cases each, one lot per month. He signed the indent not in his own name, but in that of Chunilal Khushaldas and Co., Chunilal being his son. The payment was to be made by means of drafts on Chunilal Khushaldas and Co., drawn against each consignment. The cigarettes began to arrive in 1900. Khushaldas accepted the drafts forwarded to him by Ardeshir as agent of Fracis, Times and Co., and the cigarettes were cleared. One case was sent to Ahmedabad and the others were kept for disposal in Bombay. Khushaldas tried to place the cigarettes on the market at Ahmedabad but found that they were not up to the sample submitted to him by Ardeshir at the inception of the agreement and that people would not buy them. This gave rise to a long correspondence between the two and it gradually grew more acrimonious as fresh consignments arrived; and Khushaldas, who had paid the first three drafts, finally declined to meet the others which he had accepted. Fracis, Times and Co., consented to cancel about one-third of the contract and subsequently litigation arose between Khushaldas and Ardeshir in reference to the drafts.

Khushaldas instituted a suit, No. 70 of 1903, against Ardeshir in the Court of the Joint Subordinate Judge of Ahmedabad, for an account alleging that Ardeshir was a partner in the transaction. Ardeshir denied the allegation and contended that he

was acting merely as the agent of Khushaldas. The Subordinate Judge found that Ardeshir was not the partner of plaintiff Khushaldas and he dismissed the suit. His decree was confirmed on appeal by the District Court.

Ardeshir also brought four suits, Nos. 387, 388, 389 and 390 of 1903, against Khushaldas in the Court of the Joint Subordinate Judge of Ahmedabad on drafts which the latter had accepted but failed to meet. In suit No. 388 of 1903 the acceptance was endorsed on the original draft and in the other three suits it was endorsed on copies.

In three out of the said four suits the drafts were drawn to the order of the Chartered Bank and in the fourth the draft was drawn to the order of the Agra Bank, and the latter subsequently endorsed it to the former. On all the drafts Ardeshir was entered as the drawee in case of need.

When Khushaldas declined to meet the *bills*, the Chartered Bank made a reference to the London Firm of Fracis, Times and Co., and they replied as follows :—

Bills on C. Khushaldas and Co.

Dear Sirs,

With reference to bills drawn upon this indentor in case of need, Mr. A. F. Moos, writes us that in order to enforce payment it will be necessary for him to take legal action against the indentor, and for this purpose—so we are informed—it will be necessary for the Bank to endorse at least some of the bills "payable to his order" So will you please instruct your Bombay branch accordingly, and request them to afford him any facilities that they possibly can with a view to the clearance of these bills.

We understand that the same facility has been granted him with reference to a bill on Mr. Moosabhoy for Rs 300 and *it is with only a view to getting* these bills paid that we ask for this concession

We are, &c,
Fracis, Times and Co.

The Chartered Bank acted on the suggestion and formally endorsed the bills to Ardeshir which were the basis of his four suits mentioned above. The Subordinate Judge rejected his claims in suits Nos 387, 389 and 390 of 1903 which were based on acceptances made on copies of the drafts and awarded the

claim in suit No. 388 of 1903, in which the acceptance was made on the original draft.

Both the parties having appealed, the District Judge confirmed the decrees in the suits in which the claims were dismissed and reversed the decree and dismissed the suit in which the claim was awarded. The District Judge held that the plaintiff Ardeshir sued in his capacity as agent for Fracis, Times and Co., without disclosing his principals, the suits were, therefore, defective in form. He further held that the suits were not competent as the bills had never been dishonoured and protested and that the acceptances on the copies of the bills were not valid. His reasons were as follows:—

I find that Moos is suing in his capacity as Agent for Fracis, Times and Co. It must follow, I think, that his suits are fatally defective. His plaints represent him as suing in his own interest and do not disclose his principals: so that Khushaldas was unable to raise the defence on the merits that he would certainly have raised if the principals had appeared upon the record.

* * * * * * *

Passing to the next issue, whether a suit can lie upon a bill that has never been formally dishonoured and protested, I state my conclusion with diffidence. I think that the issue must be found in the negative. It is admitted that in this case the formal procedure contemplated by the Negotiable Instruments Act for protesting the bills has not been followed. Section 115 renders it incumbent on the holder of a bill to refer to the drawee in case of need, if such be named upon it, when the drawee has refused to accept to pay the bills; and Chapters VIII and IX prescribe the procedure to be followed thereafter in order to obtain the certificate called a protest. Moos' name appears upon all the bills as the case of need, but no reference was made to him in that capacity, and it is admitted that the bills were never dishonoured within the meaning of the Act. Do they then afford a cause of action? I think not. Such cause can only arise, or to speak more accurately, is only complete, when default is made in payment. Section 92 defines that a bill of exchange is said to be dishonoured by non-payment when the acceptor makes default in payment on being duly required to pay the same; and section 115, as I have pointed out, supplements this by providing that the bill is not dishonoured until the case of need, if there be one, has made similar default. Thus it cannot be said that default has been made in payment until both the drawee and the case of need have failed to pay. and if no such default has been made, where is the cause of action? The learned counsel for Mr. Moos endeavoured to meet this by referring to section 32, arguing that the acceptor of a bill is absolutely and finally bound by his acceptance, and that this by itself affords a cause of action under the gene-

ral Law of contract; but I cannot find a sufficient answer here. The cause of action is certainly not complete until payment has been demanded and has been refused. Nor is it easy to fathom the object of the legislature in prescribing a process of some length and circuity before a bill can be protested, if it is open to any one to disregard all the precautions provided and hurry into law Courts the moment the drawee disappoints him. I therefore find this issue in the negative.

* * * * * * *

Lastly, as to whether the acceptance upon the copies is not a valid acceptance, I must certainly follow the opinion expressed by the learned Subordinate Judge that it is not. The Negotiable Instruments Act is one which "reproduces in a statutory form the English Law of Negotiable Instruments with scarcely any modification" (Introduction to Chalmers' Edition) One year after it was passed, the English Law on the subject was codified by 45 and 46 Vict. c. 61, wherein it is expressly enacted that the acceptance must be in writing upon the bill. There can be no doubt that the meaning of section 7 of the Indian Act is the same As for the evidence furnished by some commercial gentlemen of Bombay, that it is the practice there, when the drawee lives upcountry, to substitute acceptance upon a copy for acceptance upon the original, I can only regard it as irrelevant The practice, if such there be, is not one which the law countenances, and the sooner it is abandoned the better.

The plaintiff preferred second appeals.

Raikes with *K. N. Koyaji* appeared for the appellant (plaintiff):—One of the grounds on which the plaintiff's suits were dismissed was that as the plaintiff was an agent of Fracis, Times and Co., and as this fact was not disclosed in the plaints, the defendant was prejudiced in his defence and the suits were held to be "fatally defective." But, in the first place, the principal being a resident abroad, the suits could be brought without disclosing the principal. Secondly, as the bills were endorsed to the plaintiff, he could sue in his own independent right as an indorsee, section 32 of the Negotiable Instruments Act. He was a holder under section 6 and under section 53 he stepped into the shoes of the Bank which was a "holder in due course" under section 9. Thirdly, the defendant was all along aware of the agency and could have raised any defence he liked with regard to such agency. Fourthly, he himself never raised the plea of want of knowledge of the principal.

The second ground on which the suits were dismissed by both the lower Courts was that as the plaintiff, who was a

referee in case of need, was not asked to pay, the defendant was not liable under section 115 of the Negotiable Instruments Act. But section 115 has no application here. It only states what "dishonour" is in cases where there is a drawee in case of need. An acceptor is liable as a principal under section 32 of the Act and no notice of dishonour to him is necessary. He knows very well that he has committed default. It is only where a drawer or other parties are sought to be held liable that notice of dishonour is necessary to be given under section 30 of the Act.

The third ground on which three of the suits were dismissed by the lower Courts was that the acceptance was signed on copies of the bills and so did not constitute a legal and valid acceptance. The defendant signed the exact copies of the bills and sent them on for the purpose of being attached to the originals. We submit that such an acceptance is valid. The words of section 7 of the Negotiable Instruments Act need not be taken too literally. Supposing a man writes his signature on a piece of paper and then glues that piece on to the bill, it would be sufficient signing upon the bill. Similarly, a signature forwarded to be attached to a bill would, we submit, constitute a signing upon the bill. There is, besides, evidence of a custom that banks are in the habit of forwarding copies of bills, instead of the bills themselves, to people in the mofussil for being signed by them for acceptance. Such a custom ought to be given effect to.

Strangman with *Hiralal and Co.* appeared for the respondent *(defendant)*:—*The bills were not presented to the acceptor,* therefore, under section 64 of the Negotiable Instruments Act the acceptor is not liable.

As to the custom alluded to, the Subordinate Judge holds it is not proved.

Raikes in reply:—Section 61 of the Act makes presentment necessary where other parties are sought to be made liable. Here the acceptor is the principal debtor and he is liable without any presentment.

Whatever the Subordinate Judge may have held with respect to the custom, the District Judge in appeal has not found whether it is proved or not, thinking it unnecessary to do so. We submit that we are entitled to have a finding on the question.

BATCHELOR, J.:—The appellant in these appeals was the original plaintiff. He sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff, the defendant having failed to pay the bills. In the first Court three of the suits were dismissed on the ground that the defendant was not an "acceptor" within the meaning of the Negotiable Instruments Act inasmuch as he had not signed his assent upon the bills. In the fourth suit, there being no room for this objection, a decree was made in the plaintiff's favour. On appeal to the District Judge all four suits were dismissed on the grounds (i) that the plaintiff was suing as agent for the London firm Messrs. Fracis, Times and Co., without disclosing his principals so that the suits were defective in form, and (ii) that the suits were not competent as the bills had never been dishonoured and protested. Against these decrees the plaintiff has preferred the present appeals, and the first point taken before us is as to his capacity to sue. This point must, we think, be decided in his favour. The bills were endorsed over to him by the Banks in whose favour they were drawn, so that he was a holder deriving title from the holder in due course; and as such he is competent to sue under section 53 of the Negotiable Instruments Act.

Then it was urged that the learned District Judge was wrong in holding that the suits were bad because the bills had not been dishonoured and protested, and here again we think that the plaintiff's view must be sustained. The bills were made payable in Bombay, and consequently under sections 134 and 32 of the Act the acceptor became liable at the maturity of the bills. Section 115 has no bearing upon this point, but merely enacts that a bill is not dishonoured until it has been dishonoured by the drawee in case of need where such a drawee is named in the bill. It was suggested that presentment would be necessary to charge the acceptor, but that is clearly not so, and section 64 provides only that the *other parties—i. e.* the maker and the

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drawee—are not liable to the holder unless the bill has been presented to the acceptor. The acceptor is the principal debtor, and his liability is independent of presentment.

No other objection being suggested, it follows that in Appeal No. 177, where the plaintiff's acceptance was written on the original bill, the decree of the lower appellate Court must be reversed, and the suit decreed with costs throughout.

In the remaining appeals the acceptance was written on copies of the bills, and that we think, is fatal to the plaintiff's cause. Some attempt to escape this result was made by Mr. Raikes but the language of the Act is too plain to be mistaken. It is enough to say that whereas section 7 of the Act lays down that the acceptance shall be signed either upon the bill or upon one of its parts, the plaintiff's assent was signed only upon copies of the bills; and thus a material requirement of the law was omitted with the result that there was no valid acceptance.

Finally it was urged on behalf of the plaintiff that there is evidence to indicate that some Banks are in the habit of forwarding for acceptance copies of bills instead of the bills themselves. That perhaps is so; but certainly there are not before us any materials on which we could accept as proved any such custom as the law would recognise, and this suffices to dispose of the contention as it arises in these appeals. That being so, the further question which would arise upon due proof of a custom fulfilling legal requirements in respect of universality, constancy and so forth—the question namely, whether such custom could override the provisions of the Act—is a point upon which, since it cannot now arise, we must rigidly abstain from giving any opinion.

The Appeals Nos. 15, 178 and 179 must be dismissed, and the appellant must pay the costs of them.

One appeal allowed and three dismissed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

BALAJI VALAD RAOJI KOLHE (ORIGINAL PLAINTIFF), APPELLANT, v. GANGADHAR RAMKRISHNA KULKARNI (ORIGINAL DEFENDANT), RESPONDENT.*

1908. January 23.

Fraud—Allegations of—Particulars constituting fraud should be given—Issue in cases of fraud—Practice.

It is an elementary rule of law that where fraud is set up, particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud.

Per CHANDAVARKAR, J.:—It is a matter of supreme importance and necessity that a case of fraud should not be the subject of a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree passed by V. V. Bapat, Subordinate Judge at Pimpalgaon.

Suit to redeem a mortgage.

On the 10th June 1870, the ancestor of the plaintiff conveyed to the ancestor of the defendant certain lands to hold for twenty years.

In 1871 one Ramlal obtained a money decree against the ancestor of plaintiff and in execution of that decree the right, title and interest of the plaintiff was sold to one Rajaram in the year 1877 and in the year 1878 was bought by the ancestor of the defendant.

The plaintiff brought this suit in 1904, to redeem the mortgage of 1870.

* Second Appeal No. 22 of 1907.

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The Subordinate Judge held that the defendant had become the owner of the land in dispute on account of his purchase in 1878; that it was not proved that the decree and the auction sale and the defendant's purchase from the auction-purchaser were collusive and fraudulent; and that the claim was barred by the defendant's adverse possession for over twelve years.

On appeal this decree was confirmed. The learned District Judge held that if the conveyance of 1870 were a mortgage the purchase by the defendant in 1877 did not extinguish the equity of redemption, for ' the proceeding was wholly collusive and probably engineered by the defendant's father through his relations and friends. Practically then he himself brought the residuary rights of the plaintiff to sale and bought them himself. This being so, this sale would be inoperative to extinguish those residuary rights if they were rights to redeem a mortgage." The learned Judge further held that the document of 1870 must be construed not as a mortgage but as a lease. It was therefore not open to the defendant to lawfully buy the fee simple of the property at a Court-sale: the sale of 1877 was inoperative and the suit was long since barred.

The plaintiff appealed to the High Court.

D. A. Khare for the appellant.

M. R. Bodas for the respondent.

CHANDAVARKAR, J.:—We are unable to agree with the two Courts below in holding that the deed on which the appellant sued is a lease and not, what it expressly purports to be, a mortgage. The description of it by the parties as a mortgage-deed is, indeed, not conclusive, but the terms of it leave no doubt that the land specified in it was intended to be security for the payment of Rs. 187 paid to the executant by the party in whose favour the deed was executed. The deed says: "When you receive the proceeds, according to what is stated above," (*i.e.*, by cultivation of the property during twenty-one years), "the said amount of rupees borrowed from you is to be (considered) as paid up." That plainly means that the land was to be regarded

as security for the debt. Then it proceeds: "Nothing is then to be due from us"—that is, the amount of Rs. 187 was treated as a debt, which, if satisfied out of the proceeds of the land, was to be treated as liquidated. So also the deed says further on: "Your rupees are paid up when you get the proceeds without obstruction for twelve years." If there is obstruction, and no proceeds are realized, the executant undertakes to make up the loss. All these conditions are inconsistent with any intention to treat the sum of Rs. 187 as a mere rent paid in advance for the period of twenty-one years.

The District Judge has indeed found upon the hypothesis that the deed is a mortgage that the transactions of 1877-78 did not operate to extinguish the equity of redemption, because, he observes, "the proceeding was wholly collusive and probably engineered by the defendant's father through his relations and friends." We are, however, unable to accept this finding as one of fact conclusive in law in the absence of any reasons given by the District Judge and in the face of the Subordinate Judge's careful discussion of the evidence, in the course of which he has pointed out that the plaintiff alleged no fraud in the plaint but made a mere vague allegation of it in a *purshis*. It is an elementary rule of law that where fraud is set up, particulars of it must be given and it must be based upon a specification of the facts relied upon as constituting fraud. No such particulars being given in the plaint, the Subordinate Judge ought to have required the plaintiff to amend his plaint by specifying the fraud alleged; and, in case of failure by him to amend, the Subordinate Judge ought to have refused to enter into the question. Instead of that, the Subordinate Judge allowed an issue to be raised covering the case of fraud. Procedure of this kind is very much to be deprecated, because it encourages loose pleadings and false cases. We desire to impress upon Subordinate Judges the supreme importance and necessity of insisting that a case of fraud shall not be the subject of a mere vague allegation in the plaint or written statement, but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the

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form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations such as that which we find in the present case. We are constrained to make these remarks because we observe that a lax practice in this respect has grown in the mofussil Courts much to the detriment to justice and honest pleading.

In the present case, though the allegation as to fraud was vague, both parties went to trial on an issue raised on the question; and it is too late now for us to hold that the plaintiff ought not to have been allowed to rely upon that case. The Subordinate Judge found on that issue against the plaintiff on the ground that there was no evidence of fraud but it is not clear whether by that he meant that there was no evidence satisfactory to his mind or no evidence at all. The District Judge, as we have already remarked, has found on the question in favour of the plaintiff without giving any reasons or any discussion of the evidence and without apparently taking into consideration what the Subordinate Judge has pointed out, viz, the fact that the plaintiff's case as to fraud is of a vague character. The question is one into which the District Judge should enter with thoroughness. A his decision is based upon the preliminary question—wheth the deed sued on is a lease or a mortgage—and as we differ fr him on that question, we reverse the decree and remand t appeal for disposal according to law with reference to the foregoing observations. Costs shall abide the result.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *January 29.*

RAMCHANDRA VASUDEO (ORIGINAL OPPONENT), APPELLANT, v. KRISHNARAO VASUDEORAO DESHPANDE (ORIGINAL APPLICANT), RESPONDENT.*

Hindu Law—Guardianship—Joint Hindu family—Minor co-parceners—Guardian of the family property appointed by the Court—Guardianship ceases when one of the co-parceners attains majority—Guardianship goes to the adult co-parcener.

Where a joint Hindu family consists of co-parceners who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property of that group as a whole But when, subsequently, one of that group arrives at the age of majority, the guardianship of the person appointed by the Court ceases, and the Court is bound to hand over the joint family property to the adult co-parceners, notwithstanding the fact that other co-parceners are minors.

Virupakshappa v Nilgangava (1), applied.

Bindaji v. Mathurabai (2), followed.

APPEAL from the decision of S. J. Murphy, Assistant Judge, at Sátára.

There was a joint Hindu family consisting of two brothers: Krishnarao (applicant) and Ramchandra (opponent). They were both minors The Court appointed the Collector of Sátára guardian of the property in 1905.

Krishnarao attained majority in 1906.

On the 4th March 1907 he applied to the Court asking that he should be appointed guardian of the whole property.

Ramchandra opposed this application, contending that there was ill-feeling between the two brothers, and that the property should remain in the Collector's possession till he attained majority: and that in any event the minor's share in the property should remain with the Collector.

* First Appeal No. 148 of 1907.

(1) (1894) 19 Bom. 309, F B.

(2) (1905) 30 Bom. 152; 7 Bom L. R. 800.

List of the Books and Publications for sale which are less than two years old.

LEGISLATIVE DEPARTMENT.

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e **Bengal Code, Third Edition, 1905,** containing the Regulations and Local Acts in force in Bengal. Vols. I to V. Rs. 6 a volume or Rs. 30 for set of 5 Volumes.

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e **Bombay Code, Vol** [illegible] **I, Edition 1907,** containing the unrepealed Bombay Regulations and the Local Acts of the Governor General in Council, and the Regulations made under the Statute 33 Vict., Cap. 3, in force in Bombay ... ... Rs. 4. (8s.)

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e **Bombay Code, A Digest of Indian Law Cases, 1905 and 1906,** by C. E. Grey, Barrister-at-Law.

II.—Reprints of Acts and Regulations of the Governor General of India in Council, as modified by subsequent Legislation.

I of 1846 (Legal Practitioners), as modified up to 1st October 1907. [illegible]
XVIII of 1850 (Judicial Officers' Protection) with footnotes ... 1a. 6p. (1d.)
XX of 1853 (Legal Practitioners), as modified up to 1st September 1907 ... ... 1a. 9p. (1d.)
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[illegible] 1906 ... [illegible]
[illegible] March 1907. [illegible]
[illegible]
[illegible] 1906 ... [illegible]
[illegible] ed up to 1st June [illegible]
1906 ... ... [illegible]
XIX of 1883 (Land Improvement Loans), as modified up to 1st September [illegible]
1906 ... ... [illegible]
VIII of 1894 (Tariff), as modified up to 1st February 1906 ... [illegible]

Act XII of 1896 (Excise), as modified up to 1st March 1907
Act II of 1899 (Stamps), as modified up to 1st March 1907

III.—Acts and Regulations of the Governor General of India in Council as originally passed.

Acts (unrepealed) of the Governor General of India in Council up to date.
Regulations made under the Statute 33 Vict., Cap. 3, from 1905 up

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Ditto
Act IX of 1875 (Majority), as modified up to 1st May 1906
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Act VI of 1882 (Companies), as modified up to 1st A 1906
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st 1906 ... In
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Act XII of 1884 (Agriculturists' Loans), as modified up to 1st 1906 ... In Urdu
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Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu. 3a.
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... In Urdu
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VOL. XXXII.] [PART VI.



THE INDIAN LAW REPORTS.

1908.

JUNE 1.

(Pages 261 to 320.)

BOMBAY SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council ... J. V. WOODMAN (*Middle Temple*)
High Court, Bombay ... L. J. ROBERTSON (*Middle Temple*).

BOMBAY:
PRINTED AND PUBLISHED AT THE GOVERNMENT CENTRAL PRESS
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL

TABLE OF CASES REPORTED.

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APPELLATE CIVIL.

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 13, EXPL. II—Res judicata—*Property not included in the former suit—Right as heir decided in the former suit with respect to other property—The decision does not bar the second suit.*] K. brought a suit against A. and others to recover some property as heir of one S., praying for a partition of the properties specified in the plaint and for allotment to him of S.'s share therein. A. denied K.'s heirship and asserted himself to be heir of S. It was decided that A. was the heir of S. and the suit was dismissed.

A. then [illegible] another suit against K. to establish his right as S.'s heir to property n[illegible] The lower appellate Court negatived [illegible] ailed to make the omission by K. to in[illegible] revious suit for partition a ground of defence, A.'s right to the property was in the second suit barred under Explanation II to section 13 of the Code of Civil Procedure (Act XIV of 1882).

On appeal to the High Court :

Held, that A.'s right to maintain the suit was not barred by *res judicata*.

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Explanation II to section 13 of the Civil Procedure Code (Act XIV of 1882) must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata*. Two of these conditions are: (1) that the matter must have been in the former suit directly and substantially in issue; and (2) that it must have been heard and finally decided in that suit.

The explanation does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit, is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence. But to constitute *res judicata*, a second condition is necessary—it must have been finally decided and if the former suit went off on a preliminary ground not calling for adjudication on other grounds of defences whether raised or not, those grounds remain undecided.

The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit, as must be given to it if it had been made a ground of defence in the former suit.

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ably possible.

BHAGWAN *v.* WARUBAI ... ... (1908) 32 Bom. 300

———*Hindu law—Disqualified heir—Widow of the disqualified heir—Exclusion from inheritance.*] The wife or ...

It is a canon of interpretation in Hindu law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it.

PER CURIAM—According to a well-known rule of interpretation in Hindu Law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expression occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text.

GANGU *v.* CHANDRABHAGABAI ... ... (1907) 32 Bom. 275

COSTS—*High*
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taxation,
Master's discretion or go into details of such discretionary items; but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

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Where two Counsel are already briefed in a case, and a third is instructed to make an application to transfer the case from one Judge to another, and the order making the transfer makes no provision as to costs, the costs should on taxation be refused between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two Counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one Counsel only throughout, the full refreshers of the conducting Counsel and a nominal refresher of 2 G. Ms. of the other Counsel would be properly allowable against the opponent if ordered to pay costs. If the absent Counsel attends for portions of the time the case is at hearing, his refresher, proportionate to the time he attends would also be properly allowable, in addition to the full refresher allowed to the Counsel who attends and conducts the case.

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If three Counsel are engaged *before* the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which Counsel's fees should go between attorney and client. A Solicitor engaging three Counsel is entitled to have his third Counsel's costs taxed between attorney and client if he proves express authority from his [illegible]

HIGH COURT RULES AND FORMS, 1901 RULE 577—*Costs—Taxing Master's decision on a question of costs—Review by the Chambers Judge—Third Counsel's costs in a defended long cause—Practice as to retaining of Counsel and their costs—Costs of a third Counsel engaged to ask for transfer of case from one Judg*[illegible]
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cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

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[illegible] his right as S's heir to [illegible] The lower appellate Court [illegible] to make the omission [illegible] vious suit for partition a [illegible] n the second suit barred [illegible] ivil Procedure (Act XIV of 1882)

On appeal to the High Court:

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The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit, as must be given to it if it had been made a ground of defence in the former suit.

ABDULLAKHAN *v.* KHANMIA ... ... (1908) 32 Bom. 313

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expressed after a careful consideration of the law upon the point, and we accept it as laying down the correct law in such cases.

Where a joint Hindu family consists of co-parceners who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property for that group as a whole. But when, subsequently, one of that group arrives at the age of majority, the ruling of the Full Bench in *Virupakshappa* v. *Nilgangava* (1) must apply and the guardianship of the person so appointed by the Court must cease. The District Judge is right in the present case in holding that as soon as the respondent arrived at the age of majority, the order appointing the Collector guardian of the property ceased to be operative, and the Court was bound to hand over the joint family property to the co-parcener who had become an adult, although the other co-parcener is a minor.

We confirm the order with costs.

Order confirmed.

R. R.

(1) (1894) 19 Bom. 309, F. B.

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ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. *August 3.*

BANOO BEGUM, PLAINTIFF, v. MIR AUN ALI, DEFENDANT.*

High Court Rules and Forms, 1901, Rule 577†—Costs—Taxing Master's decision on a question of costs—Review by the Chambers Judge—Third Counsel's costs in a defended long cause—Practice as to retaining of Counsel and their costs—Costs of a third Counsel engaged to ask for transfer of case from one Judge to another—Practice

As a general rule the Judge in Chambers will not, on a review of taxation, interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items; but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

Where two counsel are already briefed in a case, and a third is instructed to make an application to transfer the case from one Judge to another, and the order making the transfer makes no provision as to costs, the costs should on taxation be refused between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party If the suit is conducted by one counsel only throughout, the full refreshers of the conducting counsel and a nominal refresher of 2 G Ms. of the other counsel would be properly allowable against

* O C. J. Suit No. 577 of 1906.

† RULE 577.—"Any party who may be dissatisfied with the certificate or allocatur of the Taxing Officer as to any item or part of an item which may have been objected to as aforesaid may, before the allocatur is signed, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge, may thereupon make such order as to him may seem just, but the certificate of allocatur of the Taxing Officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid: Provided that the Taxing Master shall not be bound to delay the signing of the allocatur more than twenty days from the date of the certificate."

the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case is at hearing, his refresher, proportionate to the time he attends would also be properly allowable, in addition to the full refresher allowed to the counsel who attends and conducts the case.

Where a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If both counsel find that they would owing to other engagements be unable to go in and conduct the case when it is called on it is obviously the duty of one of them to return the brief.

If three counsel are engaged *before* the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which counsel's fees should go between attorney and client. A Solicitor engaging three counsel is entitled to have his third counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safe-guard his clients' interests. If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so

Proceedings in Chambers.

Application for review of taxation.

On the 10th January 1907, Russell, J., passed a decree in the following terms :—

"I pass a decree for the plaintiff in the terms of paragraphs (*a*) to (*f*) of the plaint and direct the defendant 1 to pay the costs of the suit throughout, including all costs reserved, except the costs of the appearance for defendant 3 by separate counsel. Costs of appearance for defendant 3 by separate counsel, the defendant 3 must bear down to the time when her counsel Mr. Mirza ceased to appear for her and appeared for the plaintiff in lieu of the plaintiff's junior Counsel after which the defendant will have to bear the costs of such Counsel."

Pursuant to these directions the plaintiff's attorneys prepared their bill of costs and lodged it with the Taxing Master for taxation. The bill was finally taxed on the 15th April 1907.

On the 18th April, the first defendant's attorneys applied for a review of taxation under Rule 575 of the High Court Rules and the matter came on before the Taxing Master on the 25th of April.

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At the review, the items objected to by defendant No. 1 were as follows:—

Items objected to.	Amount charged.	Amount allowed.
Instructions for counsel to have the suit transferred to the board of Russell, J. ..	Rs. 6	Rs 3
Short instructions for counsel thereon ..	1	1
Attending Mr. Mirza and paid his fee ...	30	15
Attending when the application was made and the same was granted	10	5

The objection of defendant No. 1 as to these items was:—

"All the entries ought to go between attorney and client, there being no provision for costs."

The reply which the plaintiff's attorney returned to this was as follows:—

"*This is not an interlocutory application. The application is proper. Suit* is called on before a Judge who has advised 1st defendant and actually drawn his plaint in the cross suit. Counsel is instructed to bring these facts to his notice *which is accordingly done and the Judge refuses to hear the case.*

"There is no suggestion that the charges themselves are improper. The point now urged is not new. It was urged before the Taxing Master on taxation and discussed at great length."

The Taxing Master overruled the defendant No. 1's objection and adhered to his former taxation, on the following grounds:—

"I have gone through these points at great length during the course of hearing the objections. *I have already held and I adhere to my decision that* these costs of mentioning matter to Court were necessary and proper and should be allowed between party and party. Taxation stands."

The other item that was objected to ran as under:—

Item objected to	Amount charged.	Amount allowed.
Paid to Mr. Mirza and all the refreshers paid to him (December 11th, 13th, 14th, 15th, 18th, 20th)	Rs. 108	Rs 108

The attorneys of defendant No. 1 objected to this item, remarking—

"All the refreshers paid to Mr. Mirza ought to go between attorney and client, he being the third counsel."

The plaintiff's attorneys in reply said:—

"Mr. Mirza was not the third counsel. He was the second counsel, engaged in the case, Mr. Inverarity being unable to attend. The learned Judge in his judgment has expressly allowed Mr. Mirza's fees."

Here also the Taxing Master kept to his former taxation, on grounds which he stated as follows:—

"On general principles I hold that a party to a defended long cause is entitled to appear by two counsel throughout the hearing if he chooses to do so He is at liberty to add a new counsel during the course of the hearing if the most senior counsel is unable to attend. In such a case the proper course to follow would be to allow fees between party and party of the two counsel who actually attended at the hearing of the case and tax off the absent counsel's refreshers between attorney and client"

The defendant No. 1 thereupon obtained the Taxing Master's certificate: and applied to the Judge in Chambers for review of taxation.

Strangman, for the plaintiff.

Nariman (of *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*), for the defendant No. 1.

DAVAR, J.—Under Rule 577 the first defendant's attorneys applied to me for an order to review the taxation of the plaintiff's Bill of Costs. Mr. Strangman appeared for the plaintiff to support the Bill as taxed. It was originally intended to urge objections against four items namely: (1) Instruction charges; (2) Costs incurred in applying to me in Court to have this suit placed on another Board; (3) Refreshers allowed to Mr. Mirza, counsel for the plaintiff; and (4) Bhatta allowance of a witness named Shaik Hyat Saheb.

The first objection was not pressed before me: in fact as soon as the matter was brought on, Mr. Nariman abandoned his objection to the Instruction charges. The last item was one which appeared to me to be clearly within the Taxing Master's discretion and on my intimating my disinclination to go into

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that item Mr. Nariman did not press this matter further. The first and the fourth items objected to by the first defendant therefore go out of consideration. In view of Mr. Strangman's contention that the Chamber Judge ought not or will not interfere with the Taxing Master's discretion I think I ought to say here that I must not be taken to lay down a Rule that the Chamber Judge ought not or will not go into questions which are within the discretion of the Taxing Master or enter into questions of quantum *in all cases.* Rule 577 permits " any party who may be dissatisfied with the certificate or allocatur of the Taxing Officer as to any item or part of an item . . . . to apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item " and on such application " the Judge may make such order *as to him may seem* just."

In the case of *Smith* v. *Buller*[1] where counsel in arguing one of the items contended that it was a mere question of detail in which the Court will not interfere and urged that there must be some question of principle involved to induce the Court to review a taxation, Vice-Chancellor Malins in answer says:— " Although the Court is reluctant to go into questions of detail, it *will* do so in a proper case, and even in a question of *quantum* will do so, where there has been a charge of a very exhorbitant character."

If my information is not incorrect recently in the case of *Dahibai* v. *Soonderji*[2] the learned acting Chief Justice allowed to one of the attorneys Rs. 500 more for remuneration for work done by him than was allowed by the Taxing Master. Of course the Judge in Chambers will not go into details of taxation but will as a general rule confine his attention to such items objected to as involve some questions of principle. The rule deduced from a large number of authorities is laid down in Morgan and Wurtzburg on the Law of Costs, at page 480, 2nd Edition, where it is said . " Unless there has been some very gross overcharge . . . the Court, on an application to review, will only determine questions which involve some principle, and

(1) (1875) L. R. 19 Eq. 473. (2) (1907) 31 Bom. 430: 9 Bom. L. R. 810.

not those relating to *quantum* only, which will be left to the discretion of the Taxing Master." As a general rule therefore the Judge in Chambers will not interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

The second and third objections urged before me are not questions that are entirely within the discretion of the Taxing Master. They involve questions of principle and as such I felt it to be my duty to hear arguments and express my opinion on them. The first objection is to a group of small items of costs involved in instructing counsel to apply to me in Court to have the case removed from my Board and have it placed on another Board. The reason for the application was that I had been counsel in the case for one of the parties. This application was made to me and I intimated that I would not hear the case. Now under what circumstances are the costs of this application sought to be made payable by the first defendant? In the first place no notice of this application was given to the first defendant. The first defendant did not appear on the application. Mr. Mirza, who mentioned the matter to me, never asked me to make the costs of that application costs in the cause. If such an application had been made I should have unhesitatingly refused it. In numbers of cases since I took my seat on the Bench counsel engaged in those cases have sometimes when the case is called on and sometimes before that asked me if I would take a particular case or would wish it to be placed on another Board by reason of my having been counsel in the case. No one has yet asked me to make costs of such an application costs in the cause for the simple reason that no separate costs are at all necessary. In this particular case, however, the circumstances under which the costs were incurred seem to be peculiar. Briefs for hearing were delivered to Messrs. Inverarity and Strangman for the

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plaintiff. On the day that Mr. Mirza applied to me these gentlemen were actually holding the plaintiff's briefs. Any one of them could have come into my Court or come into my room and asked me if I would take the case or not. When I asked Mr. Strangman, who tried to justify these items of costs as properly allowed between party and party, why the counsel in the case did not mention the matter to me, he told me that both his learned leader and himself were unable to come into my Court and therefore another counsel had to be briefed to make the application as it is called. It seems to me that it was clearly the duty of one of the counsel in the case to have mentioned the matter to me. Where was the necessity of instructing a third counsel ? Surely one of the counsel would have been before me when the case would be called on and he could have mentioned the matter then—and the case would have appeared on another Board the next day. If the plaintiff's two counsel were so busy as not to be able to spare two minutes of their time to come in and mention this matter to me, if the plaintiff or her advisers were anxious to do so before the hearing was reached, and the plaintiff is put to extra expenses, surely that is no reason why the first defendant should pay the costs so incurred. That the action of the plaintiff's solicitor who attended to this case was not in the least degree improper in doing what he did I am anxious to acknowledge. I believe he had witnesses from the moffusil and he was anxious to avoid delay as far as possible and he preferred to incur small costs rather than wait till the case was called on or till his counsel were free to come in. He ought to have pressed one of his two counsel to come in and mention the matter to me and I am sure none of them would have endorsed their Briefs or charged a fee for doing this. If he did not succeed in getting his counsel to come in, it is his or his client's misfortune for which his adversary, the first defendant, could not be made to pay. I think the Taxing Master ought to have refused to allow these costs as between party and party in the absence of any provision for them and any order making them costs in the cause. These items ought to be disallowed between party and party and may be allowed between attorney and client.

The next group of items to be considered are refreshers allowed to the plaintiff's counsel, Mr. Mirza. The dispute in respect of these refreshers arises under the following circumstances. Previous to the hearing of this suit the plaintiff's solicitors briefed Messrs. Inverarity and Strangman for the plaintiff. The third defendant in the suit is a daughter of the plaintiff. She did not contest the plaintiff's claim and only one counsel Mr. Mirza was instructed on her behalf. The case was called on for hearing before the learned Acting Chief Justice on Friday the 7th of December 1906. The same day Mr. Mirza was relieved from attendance. His Lordship's note is: "I direct that Mr. Mirza's attendance, as counsel for defendant No. 3, can be dispensed with. No order as to her costs." The case is again heard on Monday the 10th, Tuesday the 11th, of December and on six subsequent days. The plaintiff's senior counsel never appeared at the hearing of this suit at any of its stages. Mr. Mirza formally reappears at the third hearing on the afternoon of Tuesday, the 11th, after the luncheon hour.

So far as I can gather from what was told to me and what I find in the printed appeal book what happened was this. The plaintiff's solicitor attending to the suit found that his senior counsel was not attending to the suit—his junior counsel was a busy gentleman with many engagements in other Courts. A counsel who was fully conversant with the details of the case and who had appeared for a party who practically supported the plaintiff's claim was discharged from attendance. His services were available and the plaintiff's solicitor secured those services for his client. From what was stated to me I believe his services were secured for the plaintiff as soon as he was discharged from attendance on behalf of the third defendant. He, however, did not formally announce his appearance till the afternoon of the third day of hearing. It appears that he did so when Mr. Strangman was called away to the Appeal Court. The learned Judge's note is: "Mr. Mirza now appears for plaintiff with Strangman." I have the learned Judge's authority for saying that he did not know that Mr. Mirza was the third counsel for the plaintiff. He was under the impression that Mr. Inverarity

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was out of the case and Mr. Mirza had come into it. During the temporary absence of Mr. Strangman, Mr. Mirza conducted the plaintiff's case. When Mr. Strangman returned he took up the case again but Mr. Mirza continued to attend till the case was concluded. The Taxing Master under the circumstances allowed Mr. Inverarity's nominal refreshers of 2 G. Ms. as between attorney and client and allowed the full refreshers of Messrs. Strangman and Mirza during the time they attended between party and party. The first defendant is ordered to pay the plaintiff's costs of the suit and his solicitor has strenuously argued before me that such taxation is most unfair to his client and the Taxing Officer is in error in principle in allowing Mr. Mirza's refreshers against his client.

His objection, as recorded before the Taxing Master and urged before me, was that Mr. Mirza being third counsel for the plaintiff, refreshers paid to him ought to go between attorney and client. The answer to this objection is recorded in the following terms: "Mr. Mirza was not the third counsel. He was the second counsel engaged in the case, Mr. Inverarity being unable to attend. The learned Judge in his judgment has expressly allowed Mr Mirza's fees." The Taxing Master in dealing with this contention between the parties says:—"*On general principles* I hold that a party to a defended long cause is entitled to appear by two counsel throughout the hearing if he chooses to do so. He is at liberty to add a new counsel during the course of the hearing if the most senior counsel is unable to attend. In such cases the proper course to follow would be to allow fees between party and party of the two counsel who actually attend at the hearing of the case and tax off the absent counsel's refreshers between attorney and client. See judgment of Russell, J."

Before dealing with the question on the merits it is necessary to deal with the contention of the plaintiff that the learned Judge who heard the case expressly allowed Mr. Mirza's fees. The Taxing Master evidently is also under that impression for he refers to the judgment at the end of his decision. I felt some difficulty in believing that the learned Judge while giving his judgment would give direction as to *who* should pay a particular

counsel's fees. I was most anxious to do nothing that would have the least semblance of an interference with the orders or directions of the Judge who heard the suit. Portion of the paragraph printed at page 218 of the Appeal Book did not read very clear and under the circumstances I consulted the learned Judge as to what directions he meant to give. The learned Judge has been good enough to make his meaning quite clear by correcting in his own handwriting the paragraph in the copy of the book left with me and the passage now reads as follows :—

"Costs of appearance for defendant 3 by separate counsel the defendant 3 must bear during the time when her counsel Mr. Mirza appeared for her but after that time when Mr. Mirza appeared for plaintiff the defendant 1 must pay the costs."

His Lordship has removed all doubt from my mind by saying that when he made his order as to costs he had no intention whatever of giving any directions as to which of the parties was to bear Mr. Mirza's fees. He was not even aware that plaintiff was appearing by three counsel. This I think disposes of the plaintiff's contention founded on the judgment. Of course *some one must pay* Mr. Mirza's fee and refreshers—the question is between whom should they be allowed—should the refreshers be allowed against the plaintiff's opponent or should they be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two counsel. If both counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would of course be allowed on taxation against the losing party. If the suit is conducted by one counsel only throughout the full refreshers of the conducting counsel and a nominal refresher of 2 G Ms of the other counsel would be properly allowable against the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case is at hearing his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the counsel who attends and conducts the case.

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Of course a party is at liberty at any time if he or she chooses to employ a third counsel—for the matter of that there is no prohibition or limitation to the party employing a dozen counsel but this right of employing counsel must not be allowed to work hardship on the losing opponent. The counsel briefed by a party before the hearing of the suit are his proper counsel. The object of allowing a party to appear by two counsel is that the senior counsel should have the benefit and advantage of his junior's assistance, but in Bombay what has been happening for many years is that the moment a solicitor is employed to attend to what would be a contested long cause he tries to retain the two most senior counsel he could secure and generally the two are not able to attend to the case at the same time. If however they do, the client, if successful, is entitled *to have the costs of the attendance of both of them taxed* against his losing opponent. When a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no *obligation* whatever to engage a third counsel. If both counsel find that they would, owing to other engagements, be unable to go in and conduct the case when it is called on it is obviously the duty of one of them to return the brief—as a rule it is the junior counsel who has to return the brief, unless, as it very often happens, the senior offers to return *his* brief. If neither of his two briefs are returned to the solicitor in time to enable him to instruct another counsel in the place of the counsel returning his brief, the solicitor has a right to conclude that one of his counsel can come in. In this case though Mr. Inverarity did not, or could not, come in, Mr. Strangman was present when the case was called on and conducted it for the first two days and a portion of the third day. On the third day it seems he was called away to another Court. I assume it must have been known beforehand that he may be called away any time that day. The plaintiff's solicitor was entitled to have his case conducted by one of his two counsel. If Mr. Strangman had to go away and Mr. Inverarity was not able to relieve him and take up the conduct of the suit one of the two briefs should have been returned to the solicitor in time to instruct another counsel. I have no doubt what-

ever in my mind that if the difficulty likely to arise had been placed before the plaintiff's senior counsel he would immediately have returned his brief as it would be obviously unfair to the client to allow the junior counsel who had till then conducted the case and who was able to come in and take up the case to return his brief. The plaintiff's solicitor however from motives of prudence and caution had already provided for the contingency that arose. He secured the services of a counsel conversant with the details of the case as soon as the same were available and long before the difficulty arose, and, therefore, there was no necessity for either of the plaintiff's two counsel returning his brief. There would have been no question about Mr. Mirza's refresher if before he was instructed one of the plaintiff's counsel had returned his brief. As the facts stand Mr. Mirza was undoubtedly the plaintiff's third counsel. There is no prohibition against employing three counsel. If three counsel are engaged before the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which counsel's fees should go between attorney and client. A solicitor engaging three counsel is entitled, in the event of his recovering costs from the opponent, to have his third counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safeguard his client's interests.

If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so. I differ entirely with the general principles as laid down by the Taxing Master in his decision. I have thought it necessary to write this judgment because I have felt that the principles to which the Taxing Master has given expression are wholly erroneous and if not corrected would lead to most undesirable results. I am told that this is the practice prevailing in the Taxing Master's office for a long time. I can only say that I feel very strongly that the sooner it is corrected the better for the parties coming to the Court for justice and better for the reputation of His Majesty's High Court of Bombay. Such a

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practice seems to me to be most oppressive and unjust to the party losing a case and having to pay his opponent's costs.

Let me for one moment turn and contemplate what may probably be the consequences of allowing a party to a defended suit adding a third counsel at the hearing of the suit and at some stage after its commencement. A party when he enters upon a fight is usually sanguine about winning his case and making his opponent pay his costs. He is at the same time anxious to secure the best assistance he could obtain in the way of counsel for the conduct of his case. If he finds that one of the two counsel who are engaged for him is not able to come in and once it is known that he can make his opponent pay the full fees of two counsel if he adds a third one—he would invariably insist on his solicitor adding a third counsel as soon as he finds *that one of the counsel originally instructed for him cannot or* does not appear simultaneously with his colleague. The only sacrifice he would have to make would be to pay the 2 G. Ms. nominal refresher of the absent counsel, himself. This in most cases he would cheerfully do. Then, again, a party entertaining reasonable hopes of success and maliciously inclined towards his opponent as he generally is when entering upon a fight would, if he knew that he could add a third counsel, insist on his solicitor doing so in order to make the defeat of his opponent as burdensome or ruinous as possible. There are other ways in which this practice if once sanctioned is liable to be abused but it is not necessary to discuss the matter further.

I had the advantage before now of hearing and ascertaining the views of the Taxing Officer on this question. I regret I am unable to agree with the views of so experienced and painstaking an officer as Mr. Mody.

As the senior counsel of the plaintiff never appeared throughout the hearing he is entitled to his brief fee and nominal refresher of 2 G. Ms. and this must be taxed as between party and party. The full refresher of only one counsel should be allowed throughout the hearing as between party and party. Mr. Mirza for the purposes of taxation as between party and party must be taken to be either holding Mr. Strangman's brief

or appearing in the place of Mr. Strangman during his absence. All fees and refreshers payble to Mr. Mirza may be taxed as between attorney and client.

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I refer back the bill to the Taxing Officer to enable him to tax the same in the way I have indicated.

No order as to costs.

Counsel certified for purposes of taxation between attorney and client the plaintiff.

Attorneys for the plaintiff: *Messrs. Mirza, Mirza & Mangaldas.*

Attorneys for the defendants: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.* and *Messrs. Mirza, Mirza & Mangaldas.*

R. R.

APPELLATE CIVIL

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GANGU KOM DAGDU RAKHMAJI GODSE (ORIGINAL DEFENDANT), APPELLANT, v. CHANDRABHAGABAI KOM GOVIND PURSHOTTAM BHAGAWAT (ORIGINAL PLAINTIFF), RESPONDENT.*

1907. December 11.

Hindu law—Disqualified heir—Widow of the disqualified heir—Exclusion from inheritance—Rule as to construction of Hindu law texts.

The wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance under Hindu Law.

It is a canon of interpretation in Hindu law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it.

Per Curiam.—According to a well known rule of interpretation in Hindu Law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text.

SECOND appeal from the decision of V. V. Wagh, Joint First Class Subordinate Judge with A. P., reversing the decree passed

* Second appeal No. 95 of 1907.

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by Jhaverilal L. Thakur, First Class Subordinate Judge at Poona.

One Ramshet had two wives: Chinkabai and Radhabai. By the former he had one son Purushottam and by the latter he had two sons Vishnu and Dashrath. Ramshet died in 1884. Vishnu died in 1885, leaving him surviving a daughter, Gangu (defendant).

In 1897, Purshottam died leaving him surviving a son Govind, the husband of Chandrabhagabai (plaintiff).

Dashrath died in 1900. His widow Kashi applied for a certificate of heirship to her husband Govind murdered Kashi, for which offence he was executed.

The plaintiff Chandrabhagabai filed this suit for a declaration that she was the heiress of Dashrath. The defendant contended *inter alia* that the plaintiff's husband murdered Dashrath's widow, and consequently did not get inheritance, that the plaintiff's husband having got no inheritance plaintiff did not get it and that there was no probability of her getting it.

The Subordinate Judge held that Govind was not the heir of Dashrath's property and that he had no inheritable interest in it which could descend on his death to the plaintiff. His reasons were as follows:—

From these admitted facts it appears, that Vishnu and Dashrath owned the properties in suit as of their two-third share in their father Ram Seth's properties; that Vishnu died during minority and in union with his uterine brother Dashrath and that consequently Dashrath became the sole owner of the said properties as a survivor, though Vishnu had left him surviving a widow Lakshmi, who has since remarried, and a daughter Gangu the defendant, that on Dashrath's death his widow succeeded to them. On her death, according to Hindu Law, plaintiff's husband Govind, who was a son of her husband Dashrath's step-brother Purushottam, was entitled to succeed to Dashrath's properties in preference to his deceased brother Vishnu's daughter Gangu—the defendant who fell under the class Bandhu, and on Govind's death his widow the plaintiff was entitled to them. Under ordinary circumstances therefore, plaintiff as a widow of Dashrath's step-brother's son, is the preferential heir of his properties and not the defendant. It is however contended that plaintiff's husband having murdered Dashrath's widow, became disqualified under Hindu Law to inherit Dashrath's properties and that the plaintiff who can only claim that right through him, as a widow of a disqualified heir, cannot claim it. The

case of *Vedanayaga Mudliar* v. *Vedammal*, I. L. R. 27 Mad. p. 591, has been cited as authority in support of the said contention. It has been held in that case that "The question whether a Hindu who has been a party to a murder is prevented from succeeding to the estate of the person murdered is not answered by the Hindu Law. But the principle that no one shall be allowed to benefit by his own wrongful act is of universal application. If the defendant was a party to the murder her wrongful act, while not preventing the vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those who would be entitled to it, were the guilty heir out of the way."

The case is similar to the present one. The only difference is that there the defendant who would be in ordinary course the heir of her deceased minor son, was alleged to be concerned in the murder of the deceased and the plaintiff was the person who would be entitled to succeed to the property of the deceased if she were out of the way. While here the plaintiff is the widow of the person who in ordinary course would have been entitled to inherit the properties of Dashrath on the death of his widow Kashi whom he murdered and the defend-

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interest which he can transmit to his heirs. The principle that property which has once vested in a person either by inheritance or partition, is not devested by a subsequently arising disability (Mayne's Hindu Law, 5th Edition, page 788) does not apply to this case.

On appeal this decree was reversed; the learned Judge in the course of his judgment remarked as follows:—

The Madras case (27 Mad. 591) relied upon in the lower Court would have governed the present case if Govind the murderer was himself the plaintiff. For the offence of her husband his innocent widow would not lose her character as Sagotra Sapinda of Dashrath. The Hindu Law ordains exclusion from inheritance in certain defined cases. The present case does not fall under that class. Exclusion was introduced with good motives. The law givers did not wish for obvious reasons that deceased and some other persons affected with permanent disabilities should marry. In the present case Govind laboured under no disqualification when plaintiff became his wife by a legal mode of marriage. It may be said that Govind was civilly dead as regards inheritance *when he committed the murder and it vested at once in plaintiff.* The rule that the "widows take the place of their husbands" simply enables the Court to find out the widow who can come in as heir, when inheritance opens out by death or otherwise and then only females, only such of them whose husband, if alive, would have taken the inheritance, would succeed. The rule is intended to fix the heir in such cases.

I doubt if the offence of murder is a disqualification under Hindu Law in all cases. Even if so I am of opinion that it does not extend to widows or children of the offender.

The defendant appealed to the High Court.

J. R. Gharpure, for the appellant (defendant) :—We contend first that murder is an incapacitating circumstance under Hindu Law. (See Narada, XIII, 21.)

We submit next that Govind being incapacitated to inherit, his widow Chandrabhagabai (plaintiff) is also debarred from inheriting the property.

Yajnyavalkya says:—"Their (of the incapacitated) *Aurasa* and *Kshetraja* sons would be entitled if faultless as also their daughters should be maintained till they are joined with (their) husband; moreover their sonless wives should be maintained if of virtuous conduct and if they are incontinent or immoral they should be banished." (II, 141, 142.) These texts follow after the text relating to partition and inheritance: hence if the

author had intended the wives or widows of incapacitated persons any higher rights it would have been specially mentioned.

Further, under Hindu Law, the wives come in as *gotraja sapindas* of their husbands and take their positions as heirs: see *Bapuji* v. *Pandurang*[1], *Bai Narmada* v. *Bhagwantrai*[2], and *Rachava* v. *Kalingapa*[3].

On the ground of public policy also, the plaintiff should not be allowed to inherit the property of one who was murdered by her husband: see *Muhammad Khan* v. *Sis Bano*[4], *Mussammat Shah Khanam* v. *Kalandhar Khan*[5] and *Roda* v. *Harnam*[6].

D. W. Pilgamkar, for the respondent (plaintiff):—Murder is not a ground of exclusion from inheritance under Hindu Law. Narada alone says that one hostile to the father should be excluded from inheritance (13, 21, 22). In no text it is laid down that a murderer is to lose his right to perform the religious ceremonies: see Gautama, 211, 1, 281, 43, 44; Vashishta, 171, 52, 54; Baudhayana, p. 2, a. 2, k. 3, ss. 37, 40; Apasthambha, p. 2, a. 6, k. 14, s. 14, 15; Vishnu, 15, 32-39; Yajnyavalkya, II. 140-142.

According to Manu (XI, 47-51; 183-188, 210, 248) every sin however great is expiable. It does not create forfeiture of rights.

Assuming the murderer is excluded still his widow who is a *sagotra sapinda* is preferred to a *bandhu*.

CHANDAVARKAR, J.:—The property in dispute belonged to one Dashrath Ramshet, on whose death in 1900, his widow Kashi succeeded as heir. In 1902, she was murdered by Govind Purshottam, son of her husband's half-brother Purshottam Ramshet. For that offence Govind was tried, convicted, and hanged in the same year.

The respondent in this second appeal, Chandrabhagabai, who is the widow of Govind, thereupon sued to recover the property of Dashrath Ramshet upon the ground that, on Kashi's death,

(1) (1882) 6 Bom. 616.
(2) (1888) 12 Bom. 505.
(3) (1892) 16 Bom. 716.
(4) (1906) P. R. No. 41 of 1906.
(5) (1900) P. R. No. 74 of 1900.
(6) (1905) P. R. No. 18 of 1905.

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the property descended to Govind as the next reversionary heir of Dashrath, and that, on Govind's death, it descended to her (the respondent) as his widow and heir. She also maintained in her claim that, in the event of its being held by the Court that in consequence of the murder of Kashi by him Govind had lost his right of inheritance to Dashrath, the property must be regarded as having devolved upon her in her own right as reversionary heir of Dashrath, by reason of her being his *gotraja-sapinda.*

The Subordinate Judge of Poona, who tried the suit, rejected the claim upon the ground that the offence of murder committed by Govind excluded him from the right of inheritance to Dashrath and that the respondent, claiming through Govind as his widow, was affected by the same disability.

On appeal by the respondent, the Appeal Court has held that, as she claimed the property in her own right as *gotraja-sapinda* of Dashrath, the disability of her husband cannot affect her and that she is entitled to succeed as Dashrath's heir.

Three points of law have been made before us on this second appeal—(1) that, in consequence of the murder by him of Kashi, Govind was absolutely disqualified from inheritance under the Hindu Law; (2) that the same disqualification extended to his widow, either absolutely so as to deprive her of all rights of inheritance, or, at least, to the limited extent of rendering her incompetent to inherit as the *gotraja-sapinda* of Dashrath, since she claims that capacity through her husband; (3) that, in any case, on grounds of public policy the respondent's claim must be disallowed. Reliance is placed in support of the first point on the authority of the ruling of the Madras High Court in *Vedanayaga Mudaliar* v. *Vedammal*[1].

It will be convenient to deal with the second point first, because, if it fails, the determination of the first becomes unnecessary.

The argument on the second point amounts to this that whatever ground of exclusion from inheritance applies to a Hindu male applies to his wife also; and that if the former becomes incompetent to inherit, the same incompetency extends to the latter also, either absolutely or at least when she claims a right of inheritance through him as her husband.

(1) (1904) 27 Mad. 591.

On the subject of exclusion from inheritance and from the right to share at a partition, there are four texts in the *Smriti* of Yajnyavalkya. These four texts occur one after the other and are explained by Vijnaneshwara in the Mitakshara. Before quoting the first text and adding his gloss to it, he states by way of introduction that it is an exception to the general rules laid down in the preceding texts as to unobstructed and obstructed succession, and succession in a reunited family. The first text specifies the kind or class of persons who are debarred from the right to inherit property or to share at a partition. The second text declares that the *aurasa* or *kshetraja* son of any of the persons mentioned as disqualified in the first text is not excluded from that right merely by reason of his father's disability, if the son is himself free from it or similar defects. The third text states that the unmarried daughters of the disqualified persons specified in the first text shall be maintained until marriage. Then comes the fourth and last text on which the argument in this second appeal turns. It directs that the sonless wives of the persons specified in the first text as being excluded from inheritance shall be maintained, if those wives are of good behaviour; but that, if they are adulterous or perverse, they should be cast out.

The first argument of the learned pleader for the appellant is that because in this last text it is laid down in express terms that the wife of a disqualified person mentioned in the first text shall be maintained, if she be virtuous, it must be inferred that she is placed in the same category as her husband and declared incompetent to inherit.

But in the first text it is expressly stated that the persons specified therein ("the impotent, the outcaste, the lame, &c.") are *niramshakas*, that is, incompetent to inherit or to take a share at a partition, but that they must be maintained in consequence of the incompetency. In the fourth text, which relates to the wives of such persons, the word *niramshaka* does not occur at all. Had it been intended to extend the personal disqualification of the husband to the wife, though she might be personally free from all disqualifying defects, she would have been declared in the fourth text incompetent to inherit in terms as express as those used in the case of the husband in the first text. According to a

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well-known rule of interpretation in Hindu Law,[1] when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text. So here in the first text, which specifies the persons excluded from inheritance, it is said that those persons *shall be maintained (bhartavyáh)* but that they are *incompetent to inherit (niramshakáh).* In the text relating to their wives, only the word *bhartavyah* ("shall be maintained") is repeated. Hence, according to the rule, disinherison was not intended to apply to them. Further, had it been a rule of Hindu Law that the disqualification of a husband *per se* attaches to his wife, that also would have been specified in the first text among the grounds mentioned in it as excluding a person from inheritance.

So far from specifying it, the text by necessary implication from its language suggests that a woman does not lose *her* right to inherit merely because of her husband's disqualification. The text runs as follows:—

"An impotent person, an outcaste, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified), must be maintained; excluding them, however, from participation" (Stokes's Hindu Law Books, page 455).

It will be observed that each disability except one is here declared to be personal. Each of those specified is mentioned as being personally incompetent to inherit except the outcaste, in whose case alone it is stated that his incompetency extends to "his issue." The sole exception so made in the case of the outcaste is founded on the Hindu *Shastra* and must be familiar to those acquainted with its root ideas and principles. When a Hindu is outcasted, it does not necessarily follow that his wife and his children born before his excommunication become outcastes with him, unless by living with him they contract the

(1) For an illustration of this rule, see Bhattoji Dikshit's *Siddhanta Kaumudi*, page 55 [The Shri Venkatesbawara Press Edition]. For another application of the rule, which answers to the legal maxim *expressio unius est exclusio alterius*, see Westropp, C. J.'s Judgment in I. L. R., 3 Bom., 280. (Chandavarkar, J.)

taint of excommunication themselves. It is otherwise with children born after the Hindu has been outcasted. In that case, such children are regarded by the *Shastras* as being born with the taint of excommunication. Hence their exclusion together with their father from the right of inheritance.

If the outcaste is singled out in the text as the only person whose disqualification extends beyond himself, the disqualification in the case of others who are specified in the text must be held to attach to them only, and not to their issue or their wives.

That is the natural construction of the first and leading text on the subject of exclusion from inheritance and that construction is warranted not only by its language but also by the fact that it is introduced by Vijnaneshwara with the prefatory remark that the text forms a special exception to the general rules laid down in the preceding texts of Yajnyavalkya regulating unobstructed (*apratibandha*) and obstructed (*sapratibandha*) succession, and succession in a reunited (*samshristi*) family. And it is a canon of interpretation in Hindu Law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it.[1]

We pass on now to the second text. It relates to the sons of those who are specified in the first text as persons debarred from all rights of inheritance and partition.

Vijnaneshwara introduces this second text with a prefatory remark, which, we think, is very material. The remark is translated by Colebrooke as follows:—

"The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds." (Stokes's Hindu Law Books, page 457.)

Implied by what? Not by the first text, because, as we have pointed out, there is no such implication in it. On the other hand, its implication is clearly the other way.

(1) For this canon see the Chapter on "impurity," in the section on *Prayaschitta*, Mitakshara (Moghe's third edition), page 292. It is —यावत्स्वविषयेऽनुवृत्तिरपवादो न भवति तावदाश्रयणीयम् ("The general rule ceases to apply only so far as is necessary for the purposes of the exception.") The canon is also given by West and Bühler in their Digest, third edition, page 880, footnote (c). [Chandavarkar, J.]

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The prefatory remark means this:—When a person is incompetent to inherit property or to obtain a share at a partition on account of any of the defects mentioned in the first text, the incompetency of his son also is apt to be inferred. Whence is the inference likely to arise? Vijnaneshwara does not stop to give the answer, because *it is plain from the texts of* Hindu Law and of the *Shastras* dealt with in the preceding portion of the Mitakshara, which, treating the son and the father as identical, make the son's rights of succession and partition in the case of his grandfather's property dependent on the father's. From them, remarks Vijnaneshwara, it is possible to argue that given *a disqualified* father, *a disqualified son* must follow.

When a son is born, his father has to address the child on the occasion of his birth-day ceremony (*jâta karma*) in words which constitute a sacred formula. The father says to the child:—"Though thou art called my son, yet verily thou art my own self." This forms the basic principle of the mutual relation between a Hindu father and his son or sons. Hence a wife is called *Jâyâ*—"she who has reproduced the husband in her son." And this theory of identity between a Hindu father and his son has found its practical application in Hindu Law. That is the origin of the doctrine that a son takes a vested interest by birth with his father in ancestral property.

But, above all, there is the text of Yajnyavalkya regulating partition "among grandsons by different fathers." That text says:—

"Among grandsons by different fathers the allotment of shares is according to the fathers." (The Mitakshara, Chapter I, Section V, plac. I, Stokes's Hindu Law Books, page 391.)

Vijnaneshwara's exposition of this text is that "although grandsons have by birth a right in the grandfather's estate, equally with sons, still *the distribution of the grandfather's property* must be adjusted through their fathers, and not with reference to themselves." That is, the sons share only what the father has to share—they have no independent right. If that is so, what is there for the son to share, when the father himself has no share to take, being excluded from all rights of inheritance and partition

on account of some personal disability of the kind specified in Yajnyavalkya's first text on the subject of exclusion from inheritance? The son must in that case fall with the father. This is in a joint family.

The same is the case in a reunited family. The rules regulating partition and succession as to it similarly provide that a son takes only what his father could have taken.

Hence Vijnaneshwara by way of introduction states that it is to remove the doubt arising from these texts relating to partition and succession, and *to preserve* the right of inheritance and partition to the son, in spite of his father's disability, that the second text of Yajnyavalkya is intended. That text declares that, provided the son is legitimate *(aurasa)* or "the offspring of the wife by a kinsman *(kshetraja)*," and is himself free from the defects or disabilities mentioned in the first text, he does not share his father's disqualification but remains entitled to the share which his father would have obtained, had he been not disqualified. That this is the scope and effect of this second text, with which we are now dealing, is explained in *the Dáyabhága* as follows :—

"Therefore the sons of such persons, being either their natural offspring or issue raised up by the wife, as the case may be, are entitled, provided they be free from similar defects, *to take their allotments according to the pretensions of their fathers.*" (Dayabhaga, Ch. V, plac 19, Stokes's Hindu Law Books, page 265.) And in a footnote Colebrook gives Achyuta's explanation of "allotments according to the pretensions of their fathers." The explanation is "Such allotment as their fathers would have had, if capable of inheriting."

But the difficulty, which arose in consequence of the texts identifying a Hindu son with his father and rendering his right to inherit his grandfather's property or obtain a share at a partition dependent upon the existence of the same right in the father, and which had to be removed by the second text, could not possibly arise in the case of a daughter or a wife. No identity similar to that of a father and his son is declared by any text as between a husband and his wife, or a father and his

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daughter. No doubt "a wife is half of her husband"—but she is only a half, not the whole, and that also for certain defined purposes into which considerations as to rights of inheritance and partition do not necessarily enter in the same way that they do in the case of a father and his son. A son is by legal fiction the whole of his father. There is no text or rule of succession or partition, according to which, a husband dying, his widow can claim to take his place as his *alter ego* in the same way that his son can and to inherit or share what he would have been entitled to inherit or share had he been alive. This same consideration applies to a daughter.

Hence it is that while Vijnaneshwara expressly introduces the second text, which relates to sons, with the remark that its purpose is to meet the difficulty arising from the father's disability being possibly supposed to descend upon the sons also, he makes no such remark while introducing the third or the fourth text, relating respectively to the daughters and the wives of disqualified persons.

If he interpreted the third and the fourth text in the sense of disinheriting the daughter and the wife also and substituting for their right of inheritance, a right to maintenance, it is singular and quite unusual in a commentator of Vijnaneshwara's clearness and consistency that he did not say so explicitly either by way of preface to the texts or by way of exposition, when he had taken special care to say it in dealing with the second text, relating to sons. He would have at least added the word "others" after "sons" in his introductory remark to the second text, which is a hemistich, the other hemistich being the third *text providing maintenance for the daughter.*

What, then, it may be asked, was the necessity of providing by means of the third and the fourth text for the maintenance of the unmarried daughters and the wives of disqualified persons, if the intention was not to declare them as sharing the incapacity of those persons in virtue of their relation to the latter?

The necessity is plain. If the second text—that which relates to the sons of a disqualified person—is an enabling clause,

inasmuch as it preserves to the particular kind of sons therein mentioned the right which they would have had if the father had not been disqualified, the third and the fourth text coming immediately afterwards and in the same connection must also be construed in the same light. They too *preserve* to the unmarried daughter and the wife of a disqualified person respectively the right which they would have had if that person had not been disqualified. What, under the general rule of Hindu Law, is an unmarried daughter's right as against her father or the undivided family of which he is a member ? It is the right of maintenance until marriage and the right to be given away in marriage. Similarly, a wife has a right of maintenance against her husband and the undivided family of which he is a co-parcener. If the father of a girl or the husband of a woman, being a co-parcener in a joint or reunited family, becomes disqualified for the purposes of inheritance and partition, the daughter and the wife whose right of maintenance in either case is founded on their relation to that coparcener, must, logically speaking, lose that right in consequence of that disqualification. It is against that loss that the third and the fourth text provide.

If that is the conclusion on a legitimate construction of the language of the texts and their examination by the light of other texts bearing on the subject, what warrant is there for construing the fourth text—that relating to the wives of disqualified persons—as not an enabling but a disqualifying clause, giving the right of maintenance as a *solatium* for the deprivation of a totally different, higher, and independent right—the right of inheritance—upon which the text itself is silent and with which it does not profess to deal even by implication? So far from there being any warrant for it, the construction lends itself to the very vice, which Vijnaneshwara declares in one of the earliest portions of the Mitakshara ought to be avoided in the interpretation of texts. For, according to that construction, the text in question, must in effect be read as being in the nature of an implied prohibition (a *parisankhyá* in the technical language of Hindu Jurists), because (it is said) by directing maintenance to be given to the sonless but chaste wife of a disqualified person, it impliedly prohibits her from inherit-

ing property. But, according to Vijnaneshwara and other commentators such as Medhatithi, no text ought to be construed as being in the nature of an implied prohibition, if that construction involves, firstly, departure from the plain and natural meaning of its language; secondly, it requires the reading into it of words with another meaning; and, thirdly, the result of that departure and that importation is to exclude or prohibit something which the *shastras* or the law have or has expressly sanctioned. The text we are discussing simply directs the doing of an act, *i. e.*, the giving of maintenance to the sonless but chaste wife of a disqualified Hindu. That is the natural meaning of its language. There is nothing prohibitive of any right in it. How then can the implied prohibition of the right of inheritance come in unless we read into the text words which are not there? But if we import such words into it, the wife becomes excluded from the right which both the *shastras* and the law have allowed to her as a *sapinda* by marriage in her husband's family. Such a mode of construction is condemned as vicious in emphatic terms by Vijnaneshwara and other commentators.

The conclusion that the text is merely enabling, not disqualifying, in its operation, is further supported by certain portions of Vijnaneshwara's discussion in the Mitakshara on a widow's right of heirship to her husband.

In that discussion he quotes the following text of Narada:—

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord." [Mitakshara, Ch. II, section I, plac. 7, Stokes's Hindu Law Books, page 429].

Having quoted this text of Narada and other texts usually cited by the opponents of a widow's right of inheritance in support of their opinion, Vijnaneshwara proceeds to give Dhareshwara's view on the question, which is that a widow is entitled to inherit her husband's property only when she obtains authority to have male issue raised up to her husband by means

of *Niyoga* (levirate); that, if she obtains no such authority, she cannot inherit but is merely entitled to maintenance. And Dhareshwara in support of that view relies on the above quoted text of Narada and also on the very text of Yajnayavalkya, now under discussion, which says that the sonless wives of disqualified persons shall be maintained, if they be chaste. [See Stokes's Hindu Law Books, plac. 12, page 430, and plac. 13, page 431]. Vijnaneshwara combats that view by pointing out that Dhareshwara has misapplied each of the two texts and extended its real scope and effect by wresting it from the context in which it occurs and interpreting it so as to affect a wife's or widow's right of inheritance, whereas it deals merely with another right—that of maintenance—arising under circumstances unconnected with inheritance. Narada's text, says Vijnaneshwara, as it is quoted by Dhareshwara in support of his view, is the latter half of a text, the first half of which shows expressly that the whole relates to coparceners in a re-united family; that the first half declares the right of the coparceners to a partition of their re-united property; and that the latter half merely directs that if in such a family one of the coparceners has died or entered a religious order and the surviving coparceners choose to effect a partition subsequently, they shall not include in such partition the *stridhan* (separate property), if any, of the wife of the coparcener who has died or entered a religious order, and that they shall give her maintenance. The text in fact, says Vijnaneshwara, merely provides for the maintenance of such a wife by the coparceners of her husband but does not pretend to deal with or touch her right of inheritance. And as to Yajnyavalkya's text which is relied upon by Dhareshwara, as being of the same purport and having the same effect as Narada's text, Vijnaneshwara points out that it relates to the maintenance of the wives of impotent and other disqualified males, implying thereby that it does not touch the rights of inheritance or other rights of those wives.

What, again, is the result of Narada's text itself as explained by Vijnaneshwara? According to that explanation, if, after a coparcener in a reunited family has died or entered a religious order, the other coparceners choose to effect a partition, they are

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prohibited from touching at such partition the *stridhan* (separate) property if any, of that coparcener's wife. Now, such property may have been acquired by her as much by inheritance as in any other way sanctioned by Hindu Law. The text of Narada does not say that it must be *stridhan* property inherited by her before her husband's death or before he entered the religious order. It may be inherited before then or *afterwards*. All that is required is that *it must be stridhan existing at the date of the* partition which the husband's coparceners propose to effect after his death or his entrance into a religious order, as the case may be. After that event and before the partition, the wife may have inherited *stridhan* property. If she has, such *stridhan* must fall within the rule of Narada enjoining the husband's coparceners to leave it to her undisturbed. And if Narada's text thus contemplates inheritance by her of property as *stridhan* after her husband has entered a religious order, the conclusion follows that the wife of a disqualified man is entitled to inherit property notwithstanding his disqualification. It follows, we say, because a man who enters a religious order is, according to Hindu law, as much a disqualified person for the purposes of inheritance as an impotent person, an idiot, a blind man, a leper, and so on; and if the wife of such a man can inherit, the wife of any other man, suffering from any of the other disabilities or defects causing disinherison, must be likewise held competent to inherit. No distinction is made between one kind of disqualification and another—all are alike in their legal effect on the person disqualified.

Having dealt with the question from the point of view of the Mitakshara, we turn now to Nilakantha's treatment of it in the Vyavahara Mayukha, which, shortly stated, is as follows. He first quotes the texts prescribing the different grounds of exclusion from inheritance; he then quotes the texts which preserve the right of inheritance to the *aurasa* or the *kshetraja* son of a disqualified Hindu; and, lastly, he quotes the texts of Yajnyavalkya which provide that the unmarried daughter and the virtuous but sonless wife of a disqualified person are each entitled to maintenance. This last quotation is prefaced by Nilakantha as follows:—

" Yajnyavalkya delivers a special rule concerning the daughters and wives of these." [Vyavahara Mayukha; Chapter IV, section XI, plac. 12: Stokes's Hindu Law Books, page 110.]

The rule embodied in the two texts in question is described by Nilakantha as *a special* rule. The original word for "special rule" is *vishesham*, which means something in addition to the general rule. Now, the general rule with reference to disqualified persons is that they cannot inherit but can only get maintenance; and the special rule is that whoever inherits the property which the disqualified person would have inherited, had he been qualified, should maintain not only him but also his unmarried daughters and wife. The *special* rule, therefore, is an additional provision for the benefit of the daughters and the wife of a disqualified person, conferring a special right of maintenance upon them, because had the disqualified person been entitled to inherit, the property would have been a source of their maintenance. Had Nilakantha construed the general rule as implying that the wife also of a disqualified Hindu becomes disqualified by reason of his disqualification and the text providing maintenance for her as providing it in lieu of her right to inherit, he would have prefaced that text with the remark that it is a corollary to the general rule, involving the same consequence, instead of describing it as a special rule, not at all implied by or flowing out of the general.

The idea conveyed by the text being a special rule is this. When a man is held incompetent to inherit property on account of a certain defect, it is natural that the law should compensate him for the loss of the right of inheritance by giving him the right of maintenance out of that property. But that compensation does not adequately meet the hardship entailed upon him by the loss of the right of inheritance. His unmarried daughters and his wife are dependent upon him for their maintenance; and, therefore, to do him complete justice, a special or additional provision, says Nilakantha in effect, is made for their maintenance. From Nilakantha's treatment of the question, therefore, we arrive at the same conclusion as that yielded by Vijnaneshwara's treatment of it. Both deal with the text in the light of an enabling, not a disqualifying, clause

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If the disqualification of a husband disqualifies his wife, though she is herself free from the disqualifying defects, every wife, whether she has sons or not, ought to be subject to the disqualification on that account. But if the argument of the learned pleader for the appellant in this case, based on the fourth text of Yajnyavalkya, is sound, it is only the wives having no sons who must be held to share the disqualification of their husbands, because the text refers in terms to them only and not to wives who have sons Why should a distinction have been made between the two descriptions of wives? If it be objected that no distinction is intended by the text in point of disinherison but that it is made only in point of provision by way of maintenance, because a wife, having a son, being entitled under the general Hindu law to maintenance from the son, does not stand in need of it, the objection is not a sufficient answer to certain crucial questions. If the text must be construed like the first text as substituting the right of maintenance for the higher rights of inheritance impliedly taken away from the sonless wife on account of her husband's disqualification, why is not the same substituted right accorded to his wife having a son, when the husband is given that right, whether he has sons or not? It is no answer to that to say that it is because she can get maintenance from her son. Equally is the son bound, under the general Hindu law, to maintain his father—it is one and the same text of Manu which says that a son is bound to maintain his father as much as his mother

On the other hand, on our construction of the text that it is merely enabling, not disqualifying in its operation, the distinction made between a sonless wife and a wife having a son in point of maintenance on account of the husband's disqualification is satisfactorily explained.

The right of maintenance accorded to the husband by the first text is, as it is plainly expressed to be, a substituted right for the right of inheritance of which he is deprived. Being in fact carved out of the latter right, it arises independently of the question whether he has a son or not to maintain him. But the right of maintenance dealt with in the fourth text is made dependent on the question of son or no son, because, it has nothing

to do with the wife's disinherison or disqualification but is intended as a special provision by way of bounty to save her from destitution consequent upon the husband's disinherison on the one hand and the absence of a son to maintain her on the other.

Again, if the fourth text is a disqualifying clause, it affects only a wife having no son What becomes then of a wife having a son? Is she also similarly disqualified or not? If she is, where is the text which says so? Not this fourth text, because it speaks only of "sonless wives", nor is there any other. A wife having a son must then be pronounced exempt from disqualification. That reduces the text to an absurd anomaly, for which there is no conceivable reason or justification in Hindu law.

So far we have dealt with the first branch of the second point made by the learned pleader of the appellant in support of this second appeal. The second branch of the same point is that the wife of a disqualified Hindu is affected by his disability, at all events to the limited extent of becoming incompetent to inherit the property of a deceased person, if she claims the inheritance as his heir through her husband.

For instance, in the present case the respondent claims to inherit the property of Dashrath as his *gotraja sapinda* through her deceased husband, Govind, who was Dashrath's half brother's son. And it is maintained for the appellant that, the capacity of *gotraja sapinda* having devolved on the respondent through her husband, his disqualification attaches to her and deprives her of the right to inherit.

That is, she can inherit to her father as his daughter, to her brother as sister; but she cannot claim to inherit to any one through her husband. The texts on the subject of exclusion from inheritance contain nothing, express or implied, to warrant the inference of such a partial disqualification. The disqualification mentioned in the first and leading text is general and absolute. If the husband is disqualified on account of any of the defects specified in it, he becomes incompetent to inherit in every capacity, whether as son, father, brother, and so on. And if his disqualification extends to his wife, it must have the same effect

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in her case too, in the absence of anything in the text relating to her to render that effect narrower. No doubt in some particular cases partial disqualification is enjoined by Hindu law. For instance, an unchaste widow cannot inherit to her husband, though she can inherit to her father as daughter, or to her brother as sister. In the case of an unchaste widow, the law is declared in express texts and not left to implication; and as to her capacity to inherit as a daughter, etc., in spite of her unchastity, the law is of modern growth, because, according to the strict Hindu Law, *unchastity*, being either a vice or resulting in excommunication, rendered a woman incompetent to inherit in any and every capacity. But there is no text which declares that a woman becomes incompetent to inherit on account of the disqualification of her husband in cases where the inheritance is claimed by her through her husband.

There is a fallacy, besides, in the argument based on the fact of a woman claiming inheritance through her husband as a *gotraja sapinda* of a deceased person. It is no doubt because she is the husband's wife that she becomes a *gotraja sapinda* of the deceased. In other words, her *status* as wife is the cause of her *status* as *gotraja sapinda*. The former is the cause; the latter is the effect. They are what a Hindu lawyer, borrowing the language of the *Naiyayikas* (Hindu logicians), would call *karana* and *karya* respectively. But a cause and its effects are not necessarily the same in Hindu law. To take the familiar case of an earthern jar, so often given in the books to illustrate the principle, the earth of which the jar is made is the cause, the jar is the effect; but the jar is regarded nevertheless as being substantially different from the earth. Similarly, the fact of a woman being the wife of a certain man is the cause of her being a *gotraja sapinda* of her husband's brother or the like; but nevertheless the *sapindaship* is an entity by itself, distinct from, though arising out of, the cause. And it is the *sapindaship* which is the immediate cause of her heirship. And the Hindu law, like the English, does not, generally speaking, "consider the causes of causes and their impulsions of one another."

Lastly, the learned pleader for the appellant appealed to "public policy" in support of his case. He urges that it is

contrary to justice, equity, and good conscience that the widow of a murderer should be allowed to inherit property which the murderer himself was disqualified from inheriting. But Bombay Regulation III of 1827, by which we are bound to apply Hindu law to Hindus, says that English law directed by the principles of "justice, equity and good conscience" should be resorted to only when the Hindu law is silent. And even if it were silent on the question under discussion, "public policy is always an unsafe and treacherous ground for legal decision" (*Janson* v. *Driefontein Consolidated Mines, Limited*) (1), and we do not see why we should hold that the wife of a murderer is incompetent to inherit property under the circumstances proved in the present case.

The conclusion of law at which we have arrived is indeed contrary to the interpretation placed by Shri Krishna Tarkalancara in his Daya Krama Samgraha on Yajnyavalkya's text relating to the wives of disqualified persons. (See plac. 17, Stokes's Hindu Law Books, page 501). But there is no discussion of the question and no reason is given for the interpretation by the learned author. The Daya Krama Samgraha, being a commentary on the Dayabhaga, cannot be regarded as an authority in the interpretation of the Mitakshara; and from what we have said in the foregoing part of this judgment in support of our conclusion it will have been observed that we proceed upon not only the language of each of Yajnyavalkya's texts on the subject of exclusion from inheritance but also on the language employed by Vijnaneshwara in the Mitakshara and by Nilakantha in the Vyavahara Mayukha either in introducing some of those texts or explaining their proper scope and effect.

We hold, then, that the wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance under the Hindu law.

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Lastly, the learned pleader for the appellant appealed to "public policy" in support of his case. He urges that it is

There is nothing in the language of section 19 of the Limitation Act (XV of 1877) to justify the narrow interpretation that the acknowledgment under the section must be addressed to the creditor or some one on his behalf.

APPEAL from the decision of Vaman M. Bodas, First Class Subordinate Judge of Sátára.

Proceedings in execution.

The appellant obtained a decree on the 11th July 1901 against the respondent. It ran as follows :—

"The defendant do pay to the plaintiff the sum of Rs 8,000 in respect of the amount of the claim, without interest, by yearly instalments of Rs. 300 each. The first instalment should be paid at the end of Falgun Shake 1822 and the further instalments should be paid in the month of Falgun in the subsequent years: on an instalment in default interest to be paid at 8 annas per month. If there be three instalments in default, all the sum remaining due together with interest on the instalments in default should be recovered by proceeding to sell the mortgaged property and in case of deficiency, from the other property of the defendant"

On the 14th July 1903, the plaintiff presented an application in execution of his decree for an order absolute and for sale of the mortgaged property, inasmuch as there had been default in paying three instalments.

In answer to this, the defendant put in his written objections signed by himself on the 28th September 1903. He said therein that there had been default in paying two instalments only. As for the second instalment, he had deposited Rs. 300 with a third person and had given a notice to the plaintiff asking him to take away the amount, and he was consequently not liable for the amount. The defendant admitted his liability to pay the third instalment, but urged that he had no means to pay and time should therefore be granted to him to enable him to pay the amount.

The Subordinate Judge held that there were no three defaults in payment and dismissed the darkhast on the 1st February 1904.

On the 24th September 1906 the plaintiff gave another darkhast to recover the two instalments and the plaintiff relied upon the signed written statement put in by the defendant in the former darkhast, as an acknowledgment of his liability to pay them.

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The Subordinate Judge dismissed the darkhast holding that it was barred by limitation.

The plaintiff appealed to the High Court.

G. K. Dandekar, for the appellant:—The written statement, dated the 28th September 1903, which was signed by the defendant, is an acknowledgment within the meaning of section 19 of the Limitation Act, 1877. It gave a fresh starting point of limitation. The present darkhast being within three years of the date of the written statement is clearly within time.

The defendant's statement that the amount of Rs. 300 had been lodged with a third person to be paid to the plaintiff amounts to acknowledgment, as provided from Explanation I to section 19 of the Limitation Act (XV of 1877). See *Maniram* v. *Seth Rupchand*[1].

B. N. Bhajekar, for the respondent:—The statement as to the second instalment does not amount to an acknowledgment within the meaning of section 19 of the Limitation Act (XV of 1877). To amount to an acknowledgment, the statement must contain a promise express or implied. It must further be addressed to plaintiff. See also *Mylapore* v. *Yeo Kay*[2].

CHANDAVARKAR, J.:—We think that in this case the appeal must be allowed. The question is whether the first and second instalments are saved by the words relied upon as acknowledgment under section 19 of the Limitation Act of 1877. There can be no doubt as to the first instalment. The acknowledgment relied upon is contained in the application put in by the judgment-debtor by way of a written statement in the Darkhast No. 717 of 1903, presented on the 27th of July 1903. In that application, which was filed on the 28th of September 1903, the judgment-debtor said that he was unable to pay that instalment but that he would pay if time were given to him. That was a distinct acknowledgment of his liability, and as the present darkhast was presented on the 24th of September 1906, the said instalment is within time. The question is then as regards the

(1) (1906) L. R. 33 I. A. 165. (2) (1887) L. R. 14 I. A. 168.

second instalment. What is relied upon as an acknowledgment as to that is contained in the second paragraph of the same application and runs in these words: (translated from the Marathi) "I have asked plaintiff by a written notice to take away the sum of Rs. 300 relating to the second instalment, from a third party with whom I have deposited that sum. Therefore I am not responsible to pay the said amount." This in effect means:— "I am liable to pay the second instalment; but I have deposited the amount of that instalment with a third person and let the plaintiff take it from him. But so far as I am concerned I refuse to pay." In other words, there is an acknowledgment of the liability, coupled, however with a refusal to pay on the ground that the amount is deposited with a third party. We think that is the natural construction of the words. We must, therefore, hold that the second instalment is not barred. But it is contended in support of the decree of the lower Court by the learned pleader for the respondent that an acknowledgment within the meaning of section 19 must be addressed to the creditor or some one on his behalf. But there is nothing in the language of that section which would justify that narrow interpretation. On the other hand, Explanation I to section 19 expressly provides that an acknowledgment would be sufficient, even if made to some person other than the creditor. Besides here there was an acknowledgment made to the knowledge of the creditor before the Court.

Lastly, it is contended that as in Darkhast No. 717 of 1903 the decree-holder had prayed for execution of the decree in respect of these two instalments but the Court rejected his prayer, his present application for the same relief must be held barred on the principle of *res judicata*. What happened in that darkhast was this. There the Subordinate Judge held that the right to execute the whole decree in default of payment of three instalments having not accrued to the decree-holder, he was not entitled to execute the whole decree. Then the question was whether the decree-holder was entitled to execute the decree in respect of the two instalments now in dispute. In the darkhast he had asked for that relief as an alternative, but it appears that when the Court asked him whether he would accept that

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relief he declined to accept it. That is what the Subordinate Judge says in express terms in his judgment. That means, so far as the relief claimed in respect of the two instalments was concerned, the decree-holder was unwilling to proceed with the darkhast and therefore it was dismissed without any adjudication on the merits. Under these circumstances, we think, having regard to the observations in *Hari Ganesh* v. *Yamunabai*[1], and having regard to the ruling of the Privy Council in *Delhi and London Bank* v. *Orchard*[2], that the present darkhast is not barred on the ground of *res judicata*. We must reverse the decree of the Court below and send back the darkhast to that Court for disposal according to law on the merits Costs of this appeal on the respondent. Costs in the lower Courts to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *January* 20.

BHAGWAN VITHOBA (ORIGINAL APPLICANT), APPELLANT, v. WARUBAI KOM BABURAO MUDKE (ORIGINAL APPELLANT), RESPONDENT.*

Hindu law—Succession—Competition between full sister and half-brother's son—Mitakshara—Sister's place in the line of heirs—Vyavahara Mayukha, views of, on the point—Value of the commentaries of Balambhatta and Nanda Pandita—Conflict between Mitakshara and Vyavahara Mayukha—Rule as to harmonising the difference.

In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is between her and a half-brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The interpretation put by Westropp, C. J., upon Balambhatta's texts in *Sakharam Sadashiv Adhikari* v. *Sitabai*[3] commented upon and dissented from except in cases where the Vyavahara Mayukha alone is applicable.

* First Appeal No. 73 of 1907.

(1) (1897) 23 Bom 35.

(2) (1877) L. R. 4 I. A. 127.

(3) (1879) 3 Bom. 353.

Rudrapa v. *Irava*[1] explained.

Per CHANDAVARKAR, J.—The commentary of Balambhatta on the Mitakshara is not regarded in this Presidency as an authority to be accepted in the interpretation of the former work without question. These observations apply more or less to Nanda Pandita also.

It is a well established rule of the Bombay High Court that where the Mitakshara is silent or obscure, the Court must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible.

APPEAL from the decision of F. J. Varley, District Judge of Sholapur.

Application for a certificate of heirship under Regulation VIII of 1827.

One Shivappa died in 1901. At his death, his widow Prayagbai got the certificate of heirship and managed the property belonging to Shivappa till her death which took place in 1904.

After her death, Bhagwan, the son of a step-brother of Shivappa, applied for a certificate of heirship to the property. He was opposed by Warubai, a full sister of Shivappa, on the ground that she was a nearer relation to Shivappa.

The District Judge dismissed the application of Bhagwan on the following grounds :—

"The relationship being admitted, the only question is as to the right of the sister to succeed as against the son of a half-brother. I. L. R. 28 Bom. 82, following 4 *ibid.* 210, is the latest authority and on the strength of it, the application must be rejected."

The applicant appealed to the High Court.

G. S. Mulgaonkar, for the appellant:—The present case is governed by the Mitakshara. It gives the half-brother a place immediately after the full brother. (See Mitakshara II. iv. 5, 6 : II. i. 5, 2-4.)

The decision in *Sakharam Sadashiv Adhikari* v. *Sitabai*[2] is opposed to my contention : but it is a case under the Vyavahara Mayukha. The Mayukha indeed locates the half-brother after sister but with grandfather. And Balambhatta includes sister among "brethren" : but this interpretation is not accepted in

[1] (1903) 28 Bom. 82. [2] (1879) 3 Bom. 353.

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this Presidency. See *Vinayek Anundrao* v. *Luxumeebaee*(1); *Mulji Purshotum* v. *Cursandas Natha*(2); *Parvati* v. *Ganpatrao Balal*(3). The High Court of Bombay has accepted Balambhatta's view only so far as to admit sisters into the line of succession: and not with a view to fix their position in that line: *Kesserbai* v. *Valab Raoji*(4).

Priority of the whole over the half blood is limited to brothers and their sons: *Vithalrao* v. *Ramrao*(5); *Samat* v. *Amra*(6); *Kesserbai* v. *Valab Raoji*(4).

The case of *Rudrapa* v. *Irava*(7) does not help us. It is not a decision on the question at issue in this suit.

The position of the half-brother in this case should be decided in his favour in accordance with the express text of the Mitakshara.

K. H. Kelkar, for the respondent:—The exact place which a sister occupied in the line of succession under Hindu law was first considered in *Vinayek* v. *Luxumeebaee*(1). It gave effect to Balambhatta's interpretation of Mitakshara text that the word "bhratara" included sisters also. It was affirmed in *Sakharam Sadashiv Adhikari* v. *Sitabai*(8) and *Lakshmi* v. *Dada Nanaji and Radhabai*(9). According to Balambhatta's interpretation the half-brother's son would come after the brothers and sisters.

The Mayukha has a different scheme of succession and if the position of the sister is to be determined in accordance with that scheme the half-brother's son would be postponed to the sister because according to Nilkantha "bhrataraha" does not include the half-brother. It is decided in *Rudrapa* v. *Irava*(7) that the position of the sister cannot be lower than that which is assigned to her by the Mayukha. On either hypothesis, therefore, the sister is entitled to preference.

CHANDAVARKAR, J.—The question of Hindu Law in this appeal is, what is the exact place of the uterine sister of a deceased

(1) (1861) 1 B. H. C. R. 117 at p. 124.
(2) (1900) 24 Bom. 563.
(3) (1893) 18 Bom. 177 at p. 183.
(4) (1879) 4 Bom. 188.
(5) (1899) 24 Bom. 317 at p. 326.
(6) (1882) 6 Bom. 394.
(7) (1903) 28 Bom. 82.
(8) (1879) 3 Bom. 353.
(9) (1879) 4 Bom. 210.

Hindu in the line of heirs, according to the Mitakshara, and whether in those parts of this Presidency, where that authority prevails over the Vyavahara Mayukha, the sister must be preferred to a half brother's son as heir of the *propositus.*

The District Judge of Sholápur, whence this case comes, has held on the latter part of the question in favour of the sister, on the authority of *Rudrapa* v. *Irava*[1]. But that ruling is not decisive of the question which arises here. The competition there was between a sister and a brother's widow, whereas in the present case it is between the former and a half brother's son. That decision has no bearing, for the purposes of the present case, beyond repeating what had been already settled before, by a long series of decisions of this Court, that the sister of a deceased Hindu in this Presidency is in the line of heirs, whether according to the Mitakshara or the Mayukha.

It is urged before us by the learned pleader for the respondent in support of the decision in appeal that, under the Mitakshara as interpreted by Nanda Pandita and by Balambhatta, the term *brothers* in the compact series of heirs given in Yajnyavalkya's text relating to obstructed succession includes *sisters*; that the said interpretation has been held to be the law for this Presidency by the Judicial Committee of the Privy Council in *Venayeck Anundrow* v. *Luxumeebaee* [2]; by the late Supreme Court of Bombay in that same case [3]; and by this Court in *Sakharam Sadashiv Adhikari* v. *Sitabai* [4], and in *Kesserbai* v. *Valab Raoji* [5].

These decisions have been subjected to a critical examination by the learned Chief Justice of this Court in his judgment in *Mulji Purshotum* v. *Cursandas Natha*[6], and we entirely agree with the conclusions arrived at by him as to the legitimate scope and effect of the decisions in question. As to the case of *Vinayek Anundrao* v. *Luxumeebaee*[3], decided by the late Supreme Court of Bombay, he has pointed out that "though the learned Judges" (of that Court) "referred to the doctrine of Balambhatta, and with an apparent leaning towards it, they never state that this view had been generally adopted in this Presidency, either by

(1) (1903) 28 Bom. 82.
(2) (1864) 9 Moo. I. A. 520.
(3) (1851) 1 Bom. H. C. R. 117.
(4) (1879) 3 Bom. 353.
(5) (1879) 4 Bom. 188.
(6) (1900) 24 Bom. 563.

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the Shastris or by the Courts, and they are careful to make the passage in the Mayukha the ultimate basis of their decision." Of the same case as decided by the Privy Council, the learned Chief Justice has observed in *Mulji Purshotum* v. *Cursandas Natha*(1), that the Privy Council made "no certain pronouncement" on the question of Balambhatta's interpretation of the term "brothers" as including "sisters".

In the case of *Sakharam Sadashiv Adhikari* v. *Sitabai* (2) there is indeed a definite pronouncement in Westropp, C. J.'s judgment in favour of Balambhatta's interpretation. But, as has been pointed out by the learned Chief Justice in *Mulji Purshotum* v. *Cursandas Natha*(1), the case of *Sakharam Sadashiv Adhikari* v. *Sitabai*(2) came from the Thána District, where the law of the Mayukha prevails; and the pronouncement there made by Westropp, C. J., in favour of Balambhatta's interpretation was under a misapprehension of the points actually decided by the Supreme Court of Bombay and by the Privy Council in *Vencyech Anundrow* v. *Luxumeebaee*(3) (see pp. 578 and 579 of the report of *Mulji Purshotum* v. *Cursandas Natha*(1)). After examining in his judgment in this last case all the decisions cited in support of the argument before him that Balambhatta's interpretation had been accepted by this Court as binding law for this Presidency, the learned Chief Justice has summed up his conclusion as follows:—

"The conclusion, therefore, to which I come on a consideration of all the authorities is that there is no actual decision that Balambhatta's doctrine has been accepted here, though there are the opinions to which I have referred in favour of that view."

Those opinions would indeed be entitled to the greatest weight, especially because amongst those, who held them and pronounced them in the most definite language as the correct law under the Mitakshara, was Westropp, C. J., whose authority on Hindu Law is and will long be deservedly among the highest, in this Court in particular, on account of the valuable services rendered by him to that law by his scholarly research and learned judgments.

(1) (1900) 24 Bom. 563. (2) (1879) 3 Bom. 353.
(3) (1864) 9 Moo. I. A. 520.

We should have, therefore, felt bound to follow Westropp, C. J.'s opinion in favour of Balambhatta's doctrine, even though it is an *obiter dictum*, were it not that a careful examination of what Balambhatta has actually said on the point in his commentary on the Mitakshara has led us to discover that the decision in *Sakharam Sadashiv Adhikari* v. *Sitabai*[1], so far as it proceeds on the law of the Mitakshara, rests upon a misapprehension of Balambhatta's doctrine.

It would seem that Westropp, C. J., had not before him the full passage in Balambhatta's commentary bearing on the question of a sister's right to inherit; and that he merely proceeded, as the Supreme Court of Bombay and afterwards the Privy Council had proceeded in *Venayeck Anundrow* v. *Luxumeebaee*,[2] upon the remarks as to Balambhatta's doctrine, given in a footnote by Colebrooke in his translation of the Mitakshara. The footnote is as follows:—

"I. Brethren.] The commentators, Nanda Pandita and Balambhatta, consider this as intending 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father', (Section 3, § 2), and conformably with an express rule of grammar. (Panini 1, 2, 68). They observe, that the brother inherits first; and in his default, the sister. This opinion is controverted by Kamalakara and by the author of the Vyavahara Mayukha". [Stokes's Hindu Law Books, p. 443.]

Now, it is true that Balambhatta says that the term "brothers" includes "sisters" and that the brother inherits first; and after him the sister. But he has never said—what Westropp, C. J., has erroneously attributed to him in *Sakharam Sadashiv Adhikari* v. *Sitabai*[1]—that the term "brother" excludes the half-brother and brings in the uterine sister before the latter. On the other hand, according to Balambhatta, the full-brother of a *propositus* inherits first; in default of him, the half brother; and that because, the term "brothers" being general includes both those of the whole and of the half-blood. The sister comes in, according to Balambhatta, after the half brother, and not before him.

(1) (1879) 3 Bom. 353. (2) (1864) 9 Mon. I. A. 520.

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This will be rendered clear from the passage in Balambhatta's commentary, a full translation of which into English, made by us, is as follows:—After stating that, among parents, the mother inherits first, and after her the father, Balambhatta proceeds:—

"Afterwards" (*i.e.* after the father), "brothers. The meaning of the term *tatha*" (in the compact series of heirs given in Yajnyavalkya's text relating to obstructed succession), "has been explained before. By repetition the second use of the term *tatha*", (in the same text), "is meant to point to the order (of succession) by nearness of blood. Therefore, where there is a combination of brothers of the whole and of the half-blood, those of the whole blood inherit first; in default of them, the brothers of the half blood inherit. That is implied (by the term *tatha*). Here the term 'brothers' includes also sisters in virtue of the rule of the *ekashesha* compound. There also", (*i.e.* in the case of sisters also), "the order of succession must be understood like that of the brothers as stated before. The term *tatha* is meant to imply the order of succession, 'father' and so on. The word 'his' in the term 'his sons' is to be construed as referring both to 'brothers' and 'sisters' according to the principle or maxim of the central bead. *Tatsutaha*," (in Yajnyavalkya's text), "means 'their sons', that is, the sons of brothers and of sisters. The term *sutaha* (sons) includes the sons of brothers and of sisters. It is to be understood that in the term *sutaha* (sons) daughters are also to be included as before."

It will be observed from this passage in Balambhatta's commentary that he says in so many words that "brothers" inherit before "sisters", and that among "brothers", those of the whole blood have priority over brothers of the half blood. He has nowhere said that the term "brothers" means those of the full blood only, or that of itself, that is, unless it is made into a compound of two words, *viz.*, "brothers and sisters", the word "brothers" of itself includes sisters so as to bring in a sister of the whole blood before a half brother, and immediately after a brother of the whole blood. Nor could Balambhatta have said it, because that would have been contrary to and inconsistent with the reasoning by means of which he has brought in the uterine sister after brothers, whether of the whole or half-blood. That

reasoning, which is founded on the rule of the *ekashesha* compound, may be amplified as follows.

The word "brothers", according to Balambhatta, is an elliptical expression, being a compound formed of two words, "brothers and sisters", of which the second word "sisters" is, for the sake of abbreviation, dropped, following a rule in Panini's Grammar, and the first word, "brothers", is retained to signify "brothers and sisters". Therefore, when we use the word "brothers", it means two distinct *personce*—a brother and his sister, of whom the "brother" comes in first and the "sister" after him. That is, it is not that the term brothers means one class consisting of brothers and sisters standing on the same footing; it signifies, when the compound is dissolved, two classes, "brothers", and "sisters", each class having two sub-divisions—the former, brothers of the whole blood and brothers of the half blood, and the latter sisters of the whole blood and sisters of the half blood. That being the case, we must exhaust the class called brothers, whether of the whole or half blood, before we bring in the sisters.

That being Balambhatta's doctrine, a sister of the *propositus*, even though she be of the whole blood, cannot inherit before his half brother, as was held by Westropp, C. J., in *Sakharam Sadashiv Adhikari* v. *Sitabai*[1]. That decision, so far as it proceeds upon Balambhatta's doctrine, must be pronounced to be unsound; and its authority as a binding decision, where the question is between a sister and a half brother, must be confined to cases to which the law of the Vyavahara Mayukha alone is applicable.

That, again, is not the only ground which discounts the value of Westropp, C. J.'s *dictum* that Balambhatta's interpretation of the term "brothers" as including "sisters" must be accepted as the law under the Mitakshara for this Presidency. It will be observed from the passage of Balambhatta, which we have quoted in translation, that he carries his doctrine based on the *ekashesha* compound completely to its logical consequences by bringing in not only "sisters", whether of the whole or half blood, after brothers of the whole and of the half blood, but, what is more, by bringing in the sons of those sisters, and their daughters

(1) (1879) 3 Bom. 353.

also. According to Balambhatta, the order of succession, in default of parents, must be as follows :—

Brothers of the whole blood.
Brothers of the half blood.
Sisters of the whole blood.
Sisters of the half blood.
Sons of brothers of the whole blood.
Sons of brothers of the half blood.
Sons of sisters of the whole blood.
Sons of sisters of the half blood.
Daughters of sisters of the whole blood.
Daughters of sisters of the half blood.

This constitutes a sweeping change in the order given in Yajnyavalkya's text relating to obstructed succession and explained by Vijnaneshwara in his Mitakshara. Our Court has declined to give a sister's son the position which Balambhatta would assign to him in the line of heirs. The law is now established that a sister's son can only come in as a *bandhu* (cognate kindred); and the same is the law now definitely settled as to a sister's daughter. This is another reason why we should decline to accept Balambhatta's interpretation of the term "brothers" as including "sisters".

But a far more important reason than even that is that in the Mitakshara itself there are clear indications that Vijnaneshwara did not think that the word "brothers" necessarily included "sisters".

This is a point which does not appear to have been brought to the notice of the learned Judges of the Supreme Court who decided the case of *Vinayek Anundrao* v. *Luxumeebaee*[1]; or of the Privy Council when that same case (IX Moore's Indian Appeals, 520) was in appeal before it; or of Westropp, C. J. and Kemball J., who decided the case of *Sakharam Sadashiv Adhikari* v. *Sitabai*[2], or the other cases where Westropp, C. J., repeated his opinion in favour of Balambhatta's interpretation.

(1) (1861) 1 Bom. H. C. R. 117. (2) (1879) 3 Bom. 353.

The first passage in the Mitakshara to which we would refer is Vijnaneshwara's exposition of two texts of Yajnyavalkya (Nos. 157 and 158) given in the 6th Chapter of the Section on "Rituals" [page 45 of the 3rd Edition of Bapu Shastri Moghe's *publication of the Mitakshara*]. *That Chapter* prescribes *the* duties of a *Snataka,* i. e., as explained by Prof. Monier Williams in his Sanskrit-English Dictionary, a Brahmin, who after performing the ceremonial lustrations required on his finishing his studentship as a *brahmacharin* (celibate) under a religious teacher, returns home and begins the second period of his life as a *grihastha* (house-holder). Among those duties is that such a Brahmin should avoid quarrels or disputes and should always live in peace with certain persons. Those persons are specified by Yajnyavalkya in the two texts in question. Among them are (1) a brother (*bhrata*), (2) female relations who, being married, have their husbands living—the Sanskrit word used to describe these relations being *jami;* and (3) uterine relations —the word used as to these being *sanabhayaha.* Now, the word *sanabhayaha* meaning uterine relations, includes both uterine brothers and sisters. If the term "brothers" is included in that word, why did Yajnyavalkya mention the term "brother" separately in the text? Addressing himself to that question, Vijnaneshwara answers as follows:—

"The reason of the separate mention of *sanabhayaha,* (which means) uterine relations, as distinguished from *bhrataraha* (brothers), is to bring in unmarried sisters."

That is, if the word *bhrataraha* (brothers) had alone been used, "unmarried sisters" would have been left out, because they are not included in that word. Hence the term *sanabhayaha* is used to mean "unmarried sisters", "married sisters" having been already brought in as being included in the word *jami,* i. e., female relations, who, being married, have their husbands living. This is Vijnaneshwara's explanation and from that it is clear that, according to him, because the word "brothers" does not include "sisters", Yajnyavalkya has had to use other words to bring the latter in.

The second passage in the Mitakshara material for our present purpose is in placitum 33 at p. 424 of Stokes's Hindu Law Books. It is as follows:—

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"The following passage of Manu: 'If among several brothers of the whole blood, one have a son born, Manu pronounces them all fathers of male issue by means of that son', is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle; for that is inconsistent with the subsequent text: 'Brothers likewise and their sons, gentiles, cognates, &c.'"

The meaning of this passage may be shortly explained. Manu says that if of several brothers only one has a son, and others are sonless, that son must be regarded as the son of all the brothers. Vijnaneshwara explains, however, that Manu's text does not mean that the brothers who are sonless become the fathers of that son like his own father, because, if that were the meaning, on the death of any of the sonless brothers, the son would become entitled to inherit the deceased's separate property as his son, in preference to his (the deceased's) brothers, contrary to the order given in Yajnyavalkya's text relating to obstructed succession, according to which the brothers of a deceased person rank as his heirs before their sons.

Therefore, says Vijnaneshwara, the proper meaning of Manu's text is, that where, there being several brothers, only one of them has sons, and the others are sonless, the latter should, if they make an adoption, adopt from among those sons in preference to other boys. Now, if Vijnaneshwara had intended to include "sisters" in the term "brothers" he would not have given this explanation of Manu's text. A sister's son cannot be adopted, according to the Hindu Shastras, but if the word brother includes a sister, a sister's son, must be, according to Vijnaneshwara's explanation, not only eligible for adoption but adopted in preference to any other boy.

Then a further point is this. If Vijnaneshwara was of opinion that in the term "brothers" must be included "sisters," for the purposes of succession, it is inconceivable that he would have left that opinion to speculation or inference instead of clearly expressing it. It is not that he was unaware of the fact that an *ekasheska* compound could be formed of the words brothers and sisters. That such a compound is possible under

particular circumstances, he seems to admit in another passage in the Mitakshara. [See placitum 20, Section XI, of the Mitakshara, Stokes's Hindu Law Books, page 463.] There he quotes a text of Manu, which says that uterine brothers and sisters are entitled to the property of their mother by equal division. Vijnaneshwara explains that the text in question does not mean that the brothers and sisters both become joint tenants or tenants-in-common so as to be entitled to divide the maternal property among them all as co-heirs. It means, says Vijnaneshwara, that the brothers form a separate class of co-heirs by themselves as distinguished from sisters and *vice versa* so that brothers take separately and divide *inter se*. And this explanation he supports on the ground that if by the text in question Manu had intended to constitute both brothers and sisters tenants-in-common in respect of their mother's wealth, he (Manu) would have used the *ekashesha* compound to convey his meaning. That shows that the question of the term "*sisters*" being included in the term brothers was present to Vijnaneshwara's mind; but that, in his opinion, such inclusion would be possible not always but under particular circumstances—that is, where it was intended to give the brothers and sisters a *joint* right,, as tenants-in-common. Balambhatta, however, makes the two words into an *ekashesha* compound so as to convey a different meaning and produce a result which is at variance with that attributed by Vijnaneshwara to the *ekashesha* compound in question. No commentator, not even Balambhatta, has maintained that the term "brothers" in Yajnyavalkya's text relating to obstructed succession must be construed to include sisters so as to entitle both brothers and sisters to inherit jointly.

These passages from the Mitakshara are, in our opinion, conclusive as showing that Balambhatta's interpretation is inconsistent with and contrary to Vijnaneshwara's meaning of the word "brothers". The *dicta* in the decisions of this Court, accepting that interpretation, must therefore be held to be erroneous and founded on a misapprehension of not only what Balambhatta has said in support of his doctrine but also of the Mitakshara itself. Valuable as is the commentary of

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Balambhatta on the Mitakshara, it is not regarded by Hindus in this Presidency as an authority to be accepted in the interpretation of the former work without question. His advocacy of the rights of women is thought by Hindus to be more or less extravagant.

The observations we have made more or less apply to Nanda Pandita also.

What, then, is the exact place to assign to the uterine sister of a deceased Hindu in the line of his heirs in cases governed by the Mitakshara? It is well settled now for this Presidency that she is an heir. The Mitakshara is silent as to her place, and it is an established rule of this Court that where the Mitakshara is silent or obscure, we must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible. The Vyavahara Mayukha brings the sister in immediately after the grandmother. Having regard to the rule just mentioned, that should be her place under the Mitakshara also. Such an arrangement would not be arbitrary, if we bear in mind two points emphasised by Vijnaneshwara in the Mitakshara.

In the first place, *sapinda* relationship being constituted, according to his doctrine, by blood, and not by the efficacy of funeral oblations, the sister is a *sapinda* of her brother. So far both the Mitakshara and the Vyavahara Mayukha agree.

The next question is whether she can be regarded as a *sagotra sapinda* of her brother, because Vijnaneshwara states that, after the grandmother, the *samanagotra* (which is the same as *sagotra*) *sapindas* of the deceased inherit—i. e., those who share the same *gotra* as the deceased.

According to the Hindu *Shastras*, a woman by marriage in the approved form loses the *gotra* of her birth and acquires that of her husband. Accepting this view, Nilakantha, the author of the Vyavahara Mayukha, observes that a sister, if she is married, cannot be treated as a *sagotra sapinda* of her brother, i. e., as being of the same *gotra* as his. But he brings

her in immediately after the grandmother in the line of heirs upon other grounds. One of those grounds is based on the text of Manu that "whoever is the nearest *sapinda*, his should be the property." This ground, as we have above pointed out, forms the doctrine of the Mitakshara also—in fact Nilakantha merely follows the Mitakshara in that respect. The second ground assigned by Nilakantha for the place assigned by him to a sister in the line of heirs is that under Yajnyavalkya's text giving the order of heirs as to obstructed succession, *gotrajas*—i. e., those born in the *gotra* of the *propositus*—inherit in default of brother's sons; and Nilakantha argues that a sister is a *gotraja* of her brothers, because she is born in her brother's *gotra*. Vijnanéshwara, on the other hand, in his exposition of Yajnyavalkya's text, explains that in default of brother's sons, *samana gotrajas*, i. e those having the same *gotra* as that of the *propositus*, are entitled to inherit.

That being Vijnaneshwara's explanation, to warrant the introduction of the sister of a propositus in the line of heirs immediately after the paternal grandmother, under the Mitakshara law, we must make out that, in the opinion of Vijnaneshwara, she can be ranked among the *sagotra sapindas* of her brother—that is, that she possesses the same *gotra* as his, notwithstanding that by marriage she has acquired the *gotra* of her husband.

Vijnaneshwara points out in the 10th Chapter on "Funeral Ceremonies," (*Shraddha Prakaranam*) in the Section on "Rituals" (*Achara*) of the Mitakshara (page 76 of Bapu Shastri Moghe's publication: 3rd Edition) that there are texts to be found, some supporting the view that the death ceremonies of a married woman should be performed by the members of her husband's *gotra* and others maintaining that they should be performed by her relations in the *gotra* of her birth. He cites a text, upholding the former view. Translated into English, it is as follows:—

"By marriage, after the seven steps, a woman loses her own *gotra*; her funeral oblation and other ceremonies should be performed by the *gotra* of her husband."

Then he cites a text to the contrary. It is as follows:—

"(The death ceremonies) should not be performed by the members of (her) husband's *gotra*, setting aside the *gotra* of her father; by birth and in death the family of a woman is her father's."

Vijnaneshwara reconciles these two apparently contrary views in this wise. Where a woman was married according to the *Asura* or the like inferior forms of marriage, or where she was married with the special object that a son born of her should be treated as the son of her father, her death ceremonies should be performed by her father's *gotra*, the reason being that, in the case of such marriages, there is no *giving away* of the girl by the parents to the husband, and the woman, notwithstanding her marriage, continues to belong to her father's *gotra* or family. Where the marriage was according to the approved, that is, the Brahma or the like form, her death ceremonies may be performed either by her husband's *gotra* or her father's—it is left to option (*Vikalpa*). That is, she may be treated as if she were of her father's *gotra* and her death ceremonies may be performed by the members of his family. It would appear from this discussion by Vijnaneshwara that he did not think that a married woman was entirely deprived of her father's *gotra* by her marriage in the approved form. If that is so, it will not be inconsistent with his theory to hold that a *sister* shares in a way the *gotra* of her brother, even though she be married in the approved form; and it is not unreasonable, on Vijnaneshwara's showing, to infer that she may be deemed to be a *sagotra sapinda* of her brother.

Vijnaneshwara cannot, therefore, ... garded as being opposed to Nilakantha's doctrine ... of a sister to inherit to her brother as a *gotraja* ... other hand, the sidelights of the Mitakshara, t... ...erred ... this judgment, bring about a har... ...o and warrant our assigning to her the s... heirs under the Mit... which i... Vyavahara Mayukha

For these reasons we hold that in cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is, as in the present case, between her and a half brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The order, therefore, under appeal must be reversed and the application of the appellant for a certificate of heirship under Regulation VIII of 1827 must be granted. As the point of Hindu law which is settled by this judgment was open to doubt, we pass no order as to the costs in this Court or the Court below.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *January 27.*

ABDULLAKHAN VALAD USMANKHAN ADHIKARI (ORIGINAL PLAINTIFF), APPELLANT, v. KHANMIA VALAD ARABKHAN ADHIKARI (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sec 13, explanation. II—Res judicata—*Property not included in the former suit—Right as heir decided in the former suit with respect to other property—The decision does not bar the second suit.*

K. brought a suit against A. and others to recover some property as heir of one S., praying for a partition of the properties specified in the plaint and for allotment to him of S.'s share therein. A. denied K.'s heirship and asserted himself to be heir of S. It was decided that A. was the heir of S. and the suit was dismissed.

A. then brought another suit against K. to establish his right as S.'s heir to property not included in the plaint in the first suit. The lower appellate Court negatived the claim upon the ground that as A. failed to make the omission by K. to include the property in dispute in the previous suit for partition a

* Second Appeal No. 509 of 1907.

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ground of defence, A.'s right to the property was in the second suit barred under Explanation II to section 13 of the Code of Civil Procedure (Act XIV of 1882).

On appeal to the High Court·

Held, that A.'s right to maintain the suit was not barred by *res judicata*.

Explanation II to section 13 of the Civil Procedure Code (Act XIV of 1882) must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata*. Two of these conditions are: (1) that the matter must have been in the former suit directly and substantially in issue; and (2) that it must have been heard and finally decided in that suit.

The explanation does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit, is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence But to constitute *res judicata*, a second condition is necessary —it must have been finally decided and if the former suit went off on a preliminary ground not calling for adjudication on other grounds of defences whether raised or not, those grounds remain undecided.

The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit, as must be given to it if it had been made a ground of defence in the former suit.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, with Appellate Powers, at Thána, reversing the decree passed by S. G. Kharkar, Subordinate Judge of Pen.

One Salekhan was the owner of an *adhikari vatan* allowance of Rs 79-3-10 payable annually from the treasury at Pen. He died in 1899.

On the 1st July 1901, Khanmiya (defendant) brought a suit (No. 265 of 1901) to recover by partition certain property from defendants in that suit Abdullakhan (plaintiff) was defendant No. 7 in that suit.

In that suit it was contended by Abdullakhan that he and not Khanmiya was the heir to Salekhan. One of the issues raised in that suit was: "Whether plaintiff (Khanmiya) is Salekhan's heir; and, if so, what is his share in the property in dispute." The finding upon this issue was that Abdullakhan was the heir to Salekhan. As a result, the suit was dismissed.

On the 6th June 1904 Abdullakhan brought the present suit against Khanmiya, alleging himself to be Salekhan's heir and claiming to recover from defendant the allowance for three years since 1901, which belonged to Salekhan. The claim to this allowance was not the subject-matter in dispute in the former suit.

The Subordinate Judge decreed the plaintiff's claim holding that the defendant was barred from disputing the plaintiff's claim by the decision in Suit No. 265 of 1901.

This decision was on appeal reversed and the suit dismissed with costs. The lower appellate Court held that the plaintiff was precluded from maintaining the suit by Explanation II to section 13 of the Code of Civil Procedure Code by the decree in Suit No. 265 of 1901.

The plaintiff appealed to the High Court.

B. V. Vidwans, for the appellant :—The first suit against the appellant was in ejectment and not for partition: so he was not under any duty to raise the plea that all the property was not brought into hotchpot. Such a plea would have been inconsistent with his claim that he was the sole heir and not the respondent.

Assuming that he might and ought to have raised the plea and failed to do so, it would not bar the present suit. The rule is that a defendant, who omits to raise any ground in defence of his possession and allow the plaintiff to win, cannot afterwards question the title of the plaintiff in a fresh suit upon any ground which he might have urged before: *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar*[1]. Here it was the defendant and not the plaintiff that won the suit.

Again, even if the defendant had raised the plea and that on that point the Court had decided against him, the matter would not have been *res judicata*. For it was sufficient to dismiss the suit that the plaintiff was not the heir: *Pralhadarbhat* v. *Vishwambhar Pandit*[2].

(1) (1866) 11 Mo. I. A. 50 at p. 77. (2) (1881) P. J. p. 23.

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J. R. Gharpure, for the respondent:—The first suit clearly was for a partition of whatever property Salekhan had: but the plaintiff who was defendant there did not set up the plea which he ought to have raised. See *Maktum* v. *Imam*(1); *Damodardas Maneklal* v. *Uttamram Maneklal*(2); *Shyama Charan Banerji* v. *Mrinmayi Debi*(3); *Gopal Lal* v. *Benarasi Pershad Chowdhry*(4); *Vinayak* v. *Dattatraya*(5).

CHANDAVARKAR, J.—The lower appellate Court has found upon the evidence that the appellant, Abdullakhan valad Usmankhan, is the heir of the deceased Salekhan, and that as such he would have been entitled to the property in dispute, were it not that his right is barred on the ground of *res judicata*.

That ground is based upon suit No. 265 of 1901, brought by the first respondent, Khanmia, claiming as the heir of the deceased Salekhan, against several persons, of whom the appellant was defendant No. 7 and the second respondent was defendant No. 13. The first respondent prayed in that suit for partition of the properties specified in his plaint and for allotment to him of Salekhan's share therein.

The property now in dispute was not included in that plaint.

The appellant in his defence denied the first respondent's heirship and asserted himself to be Salekhan's heir.

The Subordinate Judge having raised several issues, of which one was whether the first respondent or the appellant was Salekhan's heir, found upon the evidence in favour of the latter and against the former on that one issue and dismissed the suit, holding it unnecessary in consequence of that finding to decide the other issues.

The appellant has brought the suit, out of which this second appeal arises, to establish his right to the property in dispute as Salekhan's heir.

The lower Appellate Court has negatived the claim upon the ground that as the appellant failed to make the omission by the first respondent to include the property in dispute in the previous suit for partition a ground of defence, his (appellant's) right to

(1) (1873) 10 B. H. C. R. 223.
(2) (1892) 17 Bom. 271.
(3) (1902) 31 Cal. 79.
(4) (1904) 31 Cal. 428.
(5) (1902) 26 Bom. 661 at p. 667.

the property is in the present suit barred under Explanation II to section 13 of the Code of Civil Procedure.

That explanation must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata.* Two of those conditions are: (1) that the matter must have been in the former suit directly and substantially in issue; and (2) that it must have been heard and finally decided in that suit.

Explanation II does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit, is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence.

It can hardly be disputed that if it had been made a ground of defence and the Court in the former suit had declined to decide the matter but disposed of the suit on some other ground sufficient for its final adjudication, the said matter cannot be *res judicata.*

Why should the omission of the matter among the grounds of defence have a wider effect than that and become *res judicata?* Explanation II does not attribute to that omission any such effect.

For instance, suppose A, as heir of B, sues C for partition of Whiteacre. C denies A's heirship and claims to be himself the heir, and further pleads that, if the Court should hold A to be the heir, the suit for partition is bad because A has not included in his plaint another property—Blackacre—in which B had a share. The Court raises two issues:—(1) whether A or C is B's heir; (2) whether the suit is bad by reason of A's omission to include Blackacre in his claim for partition. The Court finds A is not but C is B's heir, and declines to decide the second issue because, in consequence of the finding on the first issue, it does not arise. In such a case there being no final decision on the second issue, the matter covered by it is not *res judicata.*

Now, if C had omitted to make that matter a ground of defence, under Explanation II, it would have become a matter directly

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and substantially in issue as if it had been made such a ground. But then to constitute *res judicata*, a second condition is necessary —it must have been finally decided. And if the former suit went off on a preliminary ground, not calling for adjudication on other grounds of defence, whether raised or not, those grounds remain undecided.

And that is exactly what happened in suit No. 265 of 1901 between the present parties. The first respondent was found not to be Salekhan's heir and therefore no suit for partition could lie at his instance. The Court declined to decide other issues; and even if it had decided them, the findings could not be *res judicata*, having regard to *Anusuyabai* v. *Sakharam Pandurang*[1]; *Ghela Ichharam* v. *Sankalchand Jetha*[2]; *Shib Charan Lal* v. *Raghu Nath*[3]; and *Rango* v. *Mudiyeppa*[4].

The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit as must be given to it if it had been made a ground of defence in the former suit. All that was decided in suit No. 265 was that the first respondent was not Salekhan's heir. From that preliminary finding it followed that the first respondent had no right to claim partition at all. The question whether the suit for partition was good in other respects did not arise, and as to them, therefore, the actual decision of the suit on the preliminary point could not constitute them *res judicata*, for the purposes of the present suit.

For these reasons we reverse the decree and restore that of the Subordinate Judge with costs in this and in the lower appellate Court upon the respondents.

Mr. Gharpure for respondent No. 2 urges that as his client claims as mortgagee under respondent No. 1 our decree should be without prejudice to his rights in that respect. As no question arises here as between the two respondents we decline to to accede to the prayer.

Decree reversed.

R. R.

(1) (1883) 7 Bom. 464.
(2) (1893) 18 Bom. 597.
(3) (1895) 17 All. 174.
(4) (1898) 23 Bom 296 at p. 302.

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Ramchandra Gopal v. *Sadashiv Narayan* (1885) P.J. p. 210, followed.

See CIVIL PROCEDURE CODE 356

Vajechand Ramji v. *Nandram Daluram* (1907) 31 Bom. 545, not followed.

See MAMLATDARS' COURTS ACT 337

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 373—*Withdrawal from suit—Application for withdrawal with liberty to bring fresh suit—Costs.*] Section 373 of the Civil Procedure Code (Act XIV of 1882) contemplates a withdrawal not, of the suit, but, from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the Court for permission to so withdraw.

Where a plaintiff does not desire to withdraw from the suit, unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application.

MAHANT BIHARIDASJI *v.* PARSHOTAMDAS ... ... (1908) 32 Bom. 345

——————— sec. 586—*Small Cause Suit—Character of the Suit—Second appeal—Framing issues—Exact words of the Legislature relating to issues—Contract Act* (*IX of* 1872), *sec.* 231—*Agent—Undisclosed principal—"Discloses himself"—Strict construction.*] In deter- [illegible] 586 of the [illegible] suit is to [illegible] operation [illegible]

Ramchandra Gopal v. *Sadashiv Narayan* (1885) P. J. p. 210, followed.

LAKSHMANDAS *v.* ANNA .. .. (1904) 32 Bom. 356

CONTRACT ACT (IX OF 1872), SEC. 231—*Agent—Undisclosed principal—"Discloses himself"—Strict construction.*] Section 231 of the Contract Act [illegible] first clause.

The words "discloses himself" in section 231 of the Contract Act (IX of 1872) should be construed strictly.

Per BATCHELOR, *J* :—It has been warmly urged that the third party's right [illegible] avoid the contract unless the principal, hitherto undisclosed, comes out into the open and claims the benefit of the contract for himself, and there would be no

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hardship in requiring the third party to challenge the alleged principal as to whether he makes this claim or not.

LAKSHMANDAS *v.* ANNA ... ... (1904) 32 Bom. 356

DEBT—*Hindu Law—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree.*] The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son,

Held, that the son was not liable under Hindu Law under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed *in contravention of any express provision of the law*; but the result of the suit showed that it was wrongful, and for a liability so incurred the son could not be held answerable when the estate that had come to his hands had derived no benefit from the act.

Under Hindu Law, the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable *for the debts legitimately incurred by his father; not for those attributable to* his failings, follies or caprices.

DURBAR KHACHAR *v.* KHACHAR HARSUR ... ... (1908) 32 Bom. 348

GENERAL CLAUSES ACT (I OF 1904), SEC. 7—*Repeal of the Mámlatdárs' Courts Act (Bom. Act III of 1876), by the Mámlatdárs' Courts Act (Bom. Act II of 1906)—Suit commenced under the former Act—Effect of the latter Act.*

See MAMLATDARS' COURTS ACT 337

HINDU LAW—*Debt—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree.*] The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son,

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DURBAR KHACHAR *v.* KHACHAR HARSUR ... ... (1908) 32 Bom. 348

INSOLVENCY ACT (INDIAN) (11 AND 12 VICT, C. 21), SEC. 7—*Insolvent—Vesting order—Official assignee—Withdrawal of petition for insolvency—Right of official assignee to bring suit—Right of official assignee to continue suit after withdrawal of petition.*] On the 14th October 1903 a petition in insolvency was filed and a vesting order was made by the Court. On the 15th June 1904 the insolvents took out a rule *nisi* to withdraw their petition, and the rule was made

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absolute on the 21st September 1904 But the orders were not drawn up till 27th February 1906. In the meanwhile the official assignee filed a suit on the 2nd March 1905 on behalf of the insolvents to recover a sum of money alleged to be due to the insolvents' firm in respect of certain mercantile transactions. It was objected on behalf of the defendant that the official assignee was not entitled (1) to bring the suit and (2) to continue the suit after the withdrawal of the petition

Held, that at the date of the institution of the suit the insolvency proceedings were still in force and the assets still remained vested in the official assignee. The subsequent coming into force of the order could not vitiate the institution of the suit and it was clear that the official assignee was competent to bring the suit. He was also competent to continue it, for the order of withdrawal, even after it became operative, was not effective to divest the official assignee and revest the property in the insolvents. A withdrawal of a petition, for which no provision is made in the Act, cannot be regarded as the legal equivalent to its dismissal by consent.

HAJI SAJAN *v* N. C MACLEOD ... ... (1907) 32 Bom. 321

PRACTICE—*Insolvent—Vesting order—Official assignee—Withdrawal of petition for insolvency—Right of official assignee to bring suit—Right of official assignee to continue suit after withdrawal of petition—Indian Insolvency Act* (11 and 12 *Vict.*, *c* 21), *sec* 7.

See INSOLVENCY ACT 321

——— ———*Withdrawal from suit—Application for withdrawal with liberty to bring fresh suit—Costs—Civil Procedure Code (Act XIV of 1882), sec.* 373.

See CIVIL PROCEDURE CODE 316

PROMISSORY NOTE—*Accounts—Settled accounts—Settlement of accounts by passing a promissory note—No fraud or coercion used—Waiving of examination of accounts by plaintiff of his free will—Accounts not to be re-opened.*

See ACCOUNTS 353

REPEAL—*Mamlatdars' Courts Act* (*Bom. Act II of* 1906), *secs.* 7 *and* 23—*Mâmlatdârs' Courts Act* (*Bom Act III of* 1876), *sec.* 5—*General Clauses Act* (*I of* 1904), *sec* 7—*Repeal of the Mâmlatdârs' Courts Act* (*Bom. Act III of* 1876) *by the Mamlatdars' Courts Act* (*Bom Act II of* 1906)—*Suit commenced under the former Act—Effect of the latter Act*] To disturb an existing right of appeal is not a mere alteration in procedure

Gulam Rasul v. *Balu Sayaji* (1907) 9 Bom. L. R. 527, and *Vajechand Ramji* v. *Nandram Daluram* (1907) 31 Bom. 515, not followed.

NANA *v* SHEKU ... . (1908) 32 Bom. 337

SECOND APPEAL—*Small Cause suit—Character of the suit—Civil Procedure Code* (*Act XIV of* 1882), *sec.* 586] In determining whether no second appeal lies under the provisions of section 586 of the Civil Procedure Code (Act XIV of 1882) the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court.

Ramchandra Gopal v. *Sadashiv Narayan* (1885) P. J. p. 219, followed.

LAKSHMANDAS *v.* ANNA ... ... (1904) 32 Bom. 356

SETTLED ACCOUNTS—*Accounts—Settlement of accounts by passing a promissory note—No fraud or coercion used—Waiving of examination of accounts by plaintiff of his free will—Accounts not to be re-opened.*] The plaintiff and defendant had mutual dealings and accounts In settling these accounts, the plaintiff of his own free will and accord and without any fraud practised or undue influence

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

HAJI SAJAN LALJI, APPELLANT AND DEFENDANT, v. N. C. MACLEOD, RESPONDENT AND PLAINTIFF.*

1907. December 20.

Indian Insolvency Act (11 and 12 Vict, c 21), section 7—Insolvent—Vesting order—Official assignee—Withdrawal of petition for insolvency—Right of official assignee to bring suit—Right of official assignee to continue suit after withdrawal of petition.

On the 14th October 1903 a petition in insolvency was filed and a vesting order was made by the Court. On the 15th June 1904 the insolvents took out a rule *nisi* to withdraw their petition, and the rule was made absolute on the 21st September 1904. But the orders were not drawn up till 27th February 1906. In the meanwhile the official assignee filed a suit on the 2nd March 1905 on behalf of the insolvents to recover a sum of money alleged to be due to the insolvents' firm in respect of certain mercantile transactions. It was objected on behalf of the defendant that the official assignee was not entitled (1) to bring the suit and (2) to continue the suit after the withdrawal of the petition.

Held, that at the date of the institution of the suit the insolvency proceedings were still in force and the assets still remained vested in the official assignee. The subsequent coming into force of the order could not vitiate the institution of the suit and it was clear that the official assignee was competent to bring the suit. He was also competent to continue it, for the order of withdrawal, even after it became operative, was not effective to divest the official assignee and revest the property in the insolvents. A withdrawal of a petition, for which no provision is made in the Act, cannot be regarded as the legal equivalent to its dismissal by consent.

THE facts of this case appear sufficiently from the judgments.

The suit was originally tried before Mr. Justice Davar who gave the following judgment:—

DAVAR, J.—Previous to the 14th of October 1903, Hashambhoy Visram, Fazulbhai Visram, and Hajibhai Visram were carrying on business as merchants in Bombay in the name of Visram Ebrahim and Company. The firm was involved in monetary difficulties and on the 14th of October Hashambhai and Hajibhai filed their petition in the Court for the relief of Insol-

* Original Suit No. 140 of 1905.
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* Original Suit No. 140 of 1905. Appeal No. 1501.

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vent Debtors and a Vesting Order was made on the same day whereby all their property vested in the plaintiff who was then the Official Assignee. On the following day, on the petition of a creditor, Fazulbhoy was adjudicated an insolvent and on that day, a similar Vesting Order was made in favour of the plaintiff in respect of his property. Pending their insolvency the plaintiff filed a suit, being suit No 76 of 1904, challenging certain trusts as being in fraud of the creditors. After the filing of this suit it seems that the insolvents arranged certain terms of settlement with the plaintiff and on the 15th of June 1904 Hashambhoy and Hajibhoy obtained a rule for the withdrawal of their petition and Fazulbhoy obtained a rule for the revocation of the order adjudicating him an insolvent. On the 21st of September 1904 both the rules came on for argument before the Court and both rules were made absolute on certain conditions. One of the conditions was that the insolvents were to pay to the Official Assignee as trustee for the creditors a sum sufficient to pay a composition of six annas in the rupee to the unsecured creditors—the creditors through the Official Assignee having agreed to receive the said composition in full satisfaction of their claims against the insolvents. The other conditions and provisions in the orders of the 21st of September 1904 making the rules for withdrawal of petition and revocation of adjudication absolute are immaterial for present purposes. The learned Commissioner in making the rules absolute amongst other things directed as follows :—

"Both rules absolute Not to be drawn up till composition fees, etc., are paid to the Official Assignee as Trustee."

These orders were not drawn up and sealed till the 27th of February 1906. On the 28th of September 1904 orders were obtained directing or allowing the insolvents to pay the amount of composition within 2 months from the date of those orders—the 21st of September 1904.

The suit filed by the Official Assignee challenging the trusts was settled and a consent decree was taken on the 21st of November 1904. Hajibhai Visram was not originally a party to the suit—Hashambhoy and Fazulbhoy were the first and second

defendants. By the decree Hajibhai was added a defendant to the suit and he became the 10th defendant. All the three insolvents consented to the decree. On the following day, the 22nd of November 1904, the trustees under the Indentures of Trust which were attacked paid to the Official Assignee a sum of one lac and twenty-five thousand rupees. They have since paid nothing more. The Official Assignee has subsequently recovered certain moneys belonging to the insolvents' firm and out of the recoveries so made by him he has paid moneys to the trustees of the settlements referred to in the suit.

The facts stated above are not contested. They are either proved by the documents put in at the hearing or admitted before me in the course of argument.

This suit was filed by the Official Assignee on the 2nd of March 1905, originally against two defendants to recover a large sum of money—over Rs. 42,000—alleged to be due to the insolvents' firm in respect of certain mercantile transactions. The second defendant has been dismissed from the suit. On the 5th of April 1907, the defendant obtained a summons calling upon the plaintiff to show cause why commission should not be issued to Secunderabad and Mauritius for the examination of himself and his witnesses.

When the summons came on for argument, on reading the defendant's written statement I found that in addition to other pleas the defendant contended that the plaintiff was not entitled to maintain this suit, having regard to the fact that "Visram Ebrahim and Co. had withdrawn their petition for insolvency." In his written statement he prays that accounts may be taken *after* the legal questions and points raised by him are decided. It was stated to me that orders for withdrawal were made before the Official Assignee had filed his suit. *Primâ facie* it appeared that the Official Assignee had no right to file this suit when he did and it appeared to me to be great waste of time, money and energy to let the suit go on if the defendant's contention was correct. I was asked to allow the summons to stand over—the defendant stating that he would take out a summons for the trial of Preliminary Issues. The defendant,

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on the 10th of July 1907, obtained a summons for the trial of Preliminary Issues and it came on for argument before me on the 13th of July when it appeared to me that the case may be disposed of on the issue of law only and accordingly under section 146 of the Civil Procedure Code I made an order for the trial of the issue:

"Whether the plaintiff is entitled to maintain this suit?"

As at the hearing it was argued that the plaintiff was not only not entitled to maintain the suit but that when he filed the suit he was not entitled to do so I allowed by consent another issue to be raised, namely:

"Whether the plaintiff was entitled to file this suit?"

The learned counsel for the defendant, Mr. Kanga, has contended that the insolvency of the three brothers came to a termination on the 21st of September 1904, when the rules, I have mentioned above, were made absolute He relies on the endorsements on the Schedule and certain other papers produced from the records of the Court in support of his contention that the order of withdrawal of Hashambhai and Hajibhai's petition and the revocation of Fazulbhai's adjudication were complete when the rules were made absolute. He argues that on that day, the 21st of September 1904, the property of the insolvents *revested* in the insolvents and the Official Assignee had no further interest in their property and that on the 2nd of March 1905 when this suit was filed the Official Assignee had no right to file the same and he is not now entitled to maintain it. The language of the orders making the two rules absolute is not very clear but one thing is quite certain and that is that the orders were conditional on the insolvents paying to the Official Assignee a sum sufficient to pay the unsecured creditors a composition of six annas in the rupee. That this was a condition precedent to the orders for withdrawal and revocation *taking* effect is quite clear from the learned Commissioner's notes: Ex. No. 6. The trustees of the settlements paid a lac and twenty-five thousand rupees on the 22nd of November 1904. It is not quite clear whether that sum was a sufficient payment together

with what the Official Assignee had in hand to enable him to pay the composition or whether in addition to the payment the Official Assignee appropriated towards the payment of composition money other moneys from the recoveries he made subsequent to the payment of the lac and quarter. To ascertain this would involve going into accounts and I felt that it was unnecessary to do that in view of the fact that the orders were not drawn up signed and sealed till the 27th of February 1906. I am bound to assume that the condition on which the orders were made was not fulfilled till then, and that on the 27th of February 1906 the Official Assignee was fully paid the composition money and the orders were thereupon drawn up and sealed. Under the circumstances I must hold that the insolvency of Hashambhai, Fazulbhai and Hajibhai come to a termination on the 27th of February 1906 This finding alone would enable me to answer the second issue in the affirmative and to hold that when the plaintiff filed this suit he was entitled to do so. The first issue, however, as to the plaintiff's right to maintain this suit at the present moment, raises some very interesting questions one of which is what legal effect has the withdrawal of a petition by the insolvent upon his property. On the filing of a petition in insolvency a vesting order is made in favour of the Official Assignee and the property of the insolvent vests in him The adjudication of a man insolvent has the same effect. Section 7 of the Indian Insolvent Act, 11 and 12 Vic ch. 21, deals with the dismissal of a petition and provides that the "Vesting Order made in pursuance of such petition shall from and after such dismissal be null and void." Section 11 deals with the revocation of an adjudication order and provides that "the vesting order shall in case of the adjudication being for any reason revoked be thenceforth null and void to all intents and purposes." It is a remarkable circumstance that the Act does not contemplate or provide for the withdrawal of an insolvent's petition. The want of any provision in this respect in the Act itself is supplied so far as Bombay is concerned by Rule 22 of the Bombay Rules framed by the High Court of Bombay under the powers conferred on the Court by section 78 of the Act. No corresponding Rule seems to exist in Calcutta.

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where in 1871, *In the matter of Pyarichand Mitter* (1), Mr. Justice Phear had to consider the Court's power to allow an insolvent to withdraw his petition. Mr. Justice Phear held that the Commissioner had no such power and instead of allowing a petition to be withdrawn he dismissed the petition by consent of all parties although there were no grounds arising out of the facts of the case why the petition should be dismissed. Now Bombay Rule 22, although it provides for the withdrawal of the petition, says nothing as to what becomes of the vesting order upon the application for withdrawal being granted. Counsel for the plaintiff have argued before me that the vesting order is not annulled and does not become void by reason of withdrawal of petition and on that basis they contended that the property of the insolvents, Hashambhai and Hajibhai, is still vested in the Official Assignee. They argue that where the Legislature intended that the vesting order should be rescinded or annulled they have made a provision for it and that the Court ought not to read into the Act or Rule a provision that was not made and did not exist. These contentions though apparently plausible did not recommend themselves to my mind. *To hold that on the* withdrawal of an insolvent's petition his property did not revest in him seemed to me to hold something that was quite *inconsistent with the spirit of the Act* and with the practice obtaining in the Official Assignee's office for very many years. To make sure as to what this practice was Mr. Shantaram Mangesh, the head clerk in the Official Assignee's office who has nineteen years' experience of the work done there, was called and examined and his evidence established the fact that the withdrawal of a petition has been treated by successive Official Assignees in exactly the same way as the dismissal of a petition or the revocation of an adjudication order. The moment an order for withdrawal of a petition is made the Official Assignee hands back to the insolvent whatever property he may have taken possession of by virtue of the vesting order. That this practice in the Official Assignee's office is correct there can be very *little doubt and that even the Court have recognised that the* property of the insolvent revests in him on his withdrawing

(1) (1871) 6 Beng. L. R. 518.

insolvency proceedings appears clearly from the case of *Lekhraj Chunilal* v. *Shamlal Narrowdas*.[1] It seems that the plaintiff in that case became insolvent pending the suit and an order was made by Mr. Justice Farran for the dismissal of the suit unless the Official Assignee within a certain time elected to go on with the suit and furnished security. Before the expiration of the time the insolvent obtained an order for withdrawal of insolvency proceedings. Mr. Justice Farran at the end of the time refused a motion for the dismissal of the suit for want of security and allowed the plaintiff to go on with the suit. This order was clearly made on the basis that the insolvent's property had revested in him when the insolvent's petition was withdrawn. The withdrawal of the petition terminates all insolvency proceedings—the insolvent is no longer insolvent—his original status as a solvent party is restored to him—in practice his property is restored to him—the Official Assignee does not execute any conveyance in his favour and in the face of all these circumstances to hold that the vesting order does not come to end is to hold something that seems to me to be wholly unreasonable. On the other hand, it seems to me most consistent with the spirit of the Act to hold that on the withdrawal of the petition for insolvency the vesting order comes to a determination and must be taken to be annulled. I must, therefore, find that on the withdrawal of the petition of Hashambhai and Hajibhoy the vesting order was annulled and in the absence of any special circumstance modifying the position, their property would revest in them. I have held that the orders for withdrawal and revocation came into operation on the 27th of February 1906. Under ordinary circumstances—and if there are no special circumstances, as I observed above, to modify the position of the insolvents—their property would revest in them on the 27th of February 1906. If the matter rested here and if I had nothing else to take into consideration I would be bound to hold that the plaintiff is not now entitled to maintain this suit. I have, however, before me the consent decree of the 21st of November 1901 (Ex. D) and that

[1] (1892) 16 Bom. 401.

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decree has a very important bearing on the question under my consideration. This decree records a contract. It is a contract between three parties—the three insolvents, the trustees of the settlements and the Official Assignee. Turning back to the events as they happened what appears quite clear from the documents before me is this. The insolvents seem to have been desirous of settling with their creditors—the Official Assignee representing the creditors seems to have been willing to settle with the insolvents on reasonable terms. The trustees of the settlements, which were challenged in the suit filed by the Official Assignee, appear to have been willing to help towards bringing about an end to the litigation between themselves and the Official Assignee and to terminate insolvency proceeding. The Official Assignee and the insolvents came to an agreement—the insolvents to give and the Official Assignee to receive a composition of six annas in the rupee in full satisfaction of the claims of the unsecured creditors. To carry out this agreement required a large sum of money. Where was it to come from? First, the Official Assignee had some funds in his hands belonging to the estate; secondly, there were outstandings due to the insolvents to be recovered; and, thirdly, there was the trust property in the hands of the trustees. Previous to the 21st of September 1904 the terms of settlement appear to have been concluded between the parties. The first step towards completing the settlement was the obtaining from the Commissioner in Insolvency the conditional orders of withdrawal and revocation. On this being done the trustees set about making arrangements to pay a sum of money approximately sufficient to enable the Official Assignee to pay to the unsecured creditors six annas in the rupee. Orders are then obtained allowing the insolvents to pay within two months. When the money is ready this decree is obtained on the 21st of November 1904, exactly two months after the date of the conditional orders. The trustees pay to the Official Assignee a lac and twenty-five thousand rupees on the day following the date of the decree. As a consideration for their paying this sum out of the trust estate they obtained a stipulation from the Official Assignee with the consent of the insolvents that after the Official Assignee's claims

are fully satisfied according to the agreement arrived at, he should instead of handing over the surplus estate of the insolvents to the insolvents—convey, transfer and hand over the same to the trustees. This contract *is recorded in the* decree. It is a valid subsisting contract between the parties. Although the Official Assignee has as yet executed no formal document in favour of the trustees he has given effect to the contract by paying over to the trustees money out of the recoveries he has continued to make on behalf of the insolvents' estates and he has in his books closed the account of the insolvents and opened an account with the trustees. The part of the decree which records the agreement between the Official Assignee, the insolvents and the trustees runs as follows:—

"And this Court by and with such consent doth further order that upon payment of the moneys hereinbefore directed to be paid by the said third and fourth defendants, Moossabhoy Hashambhai Visram and Ebrahim Haji Mahomed Sheriff, as trustees as aforesaid to the plaintiff—the plaintiff do assign absolutely *all* the cash assets and estate and property of what nature or kind so ever whether moveable or immoveable whether in Bombay or elsewhere of the said firm of Messrs. Visram Ebrahim & Co. and of the members of the said firm respectively and all outstandings debts and claims due to the said firm or the members thereof . . . to the said third and fourth defendants . . . as trustees of the said indentures of settlement."

Under the provisions of this decree the insolvents authorise the Official Assignee to assign and convey to the trustees what in the ordinary course of events would have come to themselves and with their consent the Official Assignee has made a contract with the trustees that instead of handing over to the insolvents their surplus property, after paying himself he would hand over, and if necessary assign the same, to the trustees. This contract between the parties was made pending insolvency proceedings. *If the decree had not come into existence the* property of the insolvents on the 27th of February 1906 would

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have revested in the insolvents. In the case of Fazulbhai the property would have revested under the provision of section 11 of the Act and in the case of Hashambhai and Hajibhai the property, I have held above, would have revested in them by reason of the withdrawal of their petition. The decree alters the relations of parties. The insolvents have waived their right to claim their property from the Official Assignee. They have authorised the Official Assignee to hand over or assign all their surplus property to the trustees After paying himself all sums he is entitled to under the decree the Official Assignee holds the property of the insolvents as a trustee for the trustees of the indentures. The moneys sought to be recovered in this suit is an "outstanding debt or claim" due to the firm of the insolvents and is covered by the terms of the consent decree The Official Assignee till such time as he assigns over the claim against the defendant to the trustees of the settlements stands possessed of the right to recover the same. The trustees are, I think, entitled to request the Official Assignee to go on recovering the outstandings on their behalf. Such an arrangement may be convenient to them. They are entitled at any moment to call upon the Official Assignee to convey and assign to them the debts, outstandings, claims, etc., due to the insolvents. Till such time as they do so and the Official Assignee assigns and conveys to them in terms of the decree he is, in my opinion, entitled to make recoveries of debts and claims due to the insolvents or their firm and to file and maintain suits to recover the same.

If the facts that have been brought out at the trial of the issues had been all before me I do not think I would have made the order I made but these questions are raised in the written statement and would have had to be tried some time or other. On both the issues my findings are in the affirmative. The plaintiff was entitled to file this suit and he is entitled to maintain the same.

Costs of the trial of these issues will be costs in the cause.

Against this judgment the defendant appealed.

Kanga (*Setalvad* with him) for the appellant.

Inverarity and *Raikes* for the respondent.

BATCHELOR, J.—The suit in which this appeal is brought was instituted by Mr. N. C. Macleod as Official Assignee of Hasambhai Visram, Hajibhai Visram, and Fazalbhai Visram, who had traded under the name and firm of Messrs. Visram, Ebrahim & Company. The object of the suit was to recover a considerable sum of money alleged to be due by the defendant to the insolvents' firm in respect of certain business dealings. In the Court below preliminary issues were raised as to whether the plaintiff was entitled (*a*) to file, and (*b*) to maintain the suit. These issues the learned Judge decided in the plaintiff's favour, and from that decision the defendant now appeals. The broad ground upon which the appeal is brought is that the plaintiff as Official Assignee became *functus officio* and that the property of the insolvents revested in them either before the institution, or during the pendency, of the suit; and for the better understanding of the points in controversy it is necessary to set out certain dates and facts which are not disputed.

On 14th October 1903 Hasam and Haji filed their petitions, and a vesting order was made by the Insolvency Court. On the following day the third partner, Fazalbhai, was adjudicated an insolvent, and a vesting order was made (Exts. G and H).

On 15th June 1904 Hasam and Haji took out a Rule Nisi (Ex. E) for leave to withdraw their petition "on payment to Mr. Macleod as trustee of a sum sufficient to pay a composition of six annas in the rupee to the unsecured creditors of the said insolvents"; and on the same day Fazalbhai took out a Rule for the revocation of his adjudication upon the same terms (Ex. F).

On 21st September 1904 these Rules were made absolute (Exts. B and C). But the Rules were not drawn up till 27th February 1906, and this suit was filed on 2nd March 1905.

It will be observed that the Rules of 21st September 1904 do not specify any period of time within which the payment sufficient for the six annas composition should be made. Accordingly on 28th September 1904 orders were obtained directing that "the amount of composition mentioned in and payable under the order made herein on the 21st September instant be paid as

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directed in the said order within two months from the 21st September instant" (Exts. 3 and 4).

In another suit filed in 1904, Suit No. 76 of 1904, the Official Assignee had impeached certain settlements made by the insolvents before their insolvency as being voluntary transfers made to defeat or delay creditors, the defendants in the suit being the three insolvents and the trustees under the impugned settlements. In this suit a consent decree (Ex. D) was taken on 21st November 1904. Speaking broadly, the terms of the decree are that the trustees under the settlement should forthwith pay to the Official Assignee a sum of money which, with the money already in his hands belonging to the estate, would enable him to pay himself as trustee for payment to the creditors of Messrs. Visram Ebrahim and Co. (in addition to all costs, charges and expenses already incurred or which might be incurred by the Official Assignee) a composition of six annas in the rupee "in accordance with the terms of the orders dated respectively 21st September last made by the Court for the relief of insolvent debtors, Bombay, in the matter of Hasambhai Visram and Hajibhai Visram and of Fazalbhai Visram."

On 21st November 1904 a payment of Rs. 1¼ lakhs was made by endorsement of a cheque by the trustees to Mr. Macleod, who apparently treated this as a payment to himself as Official Assignee; and on the following day he paid this sum over to himself as trustee for the creditors of the insolvents. On 1st January 1905 Mr. Macleod closed his account with the insolvents, and as trustee opened an account with the trustees under the settlements.

The first point urged by Mr. Kanga, who has argued the appellant's case with skill and resource, is that, under sections 7 and 11 of the Insolvent Debtors Act, the Official Assignee was divested of the assets of the insolvents on the 21st September 1904 when the rules were made absolute. In the case of Fazalbhai the argument is made to depend upon the revocation of the adjudication, which would, it is said, revest the property in the late insolvent; and no doubt that is the effect which such an order would ordinarily have. The case of Hasambhai and

Hajibhai cannot, it is conceded, be brought upon the same footing unless it be held that the withdrawal of their petition was in law the same thing as its dismissal by consent. But this is a proposition for which no authority has been shown to us, and which we are not prepared to accept in this appeal. Interesting questions have been raised as to the competence of the Court to permit a withdrawal and as to the validity of Rule No. 22 of the Rules framed under the Act, but these are subjects which we are not now concerned to pursue. It is enough to say that we cannot regard a withdrawal—for which no provision is made in the Act—as the legal equivalent of a dismissal by consent; and we are fortified in our opinion in this case by the proceedings before the Commissioner, which indicate that in fact one of the creditors, Raoji Sankalchand and Co., did not consent to the withdrawal upon the terms upon which it was allowed. We must hold that the withdrawal would not operate to discharge the vesting order.

Here it is important to recall attention to the dates which I have mentioned. The suit was instituted on 2nd March 1905, and the rules absolute for withdrawal and revocation, though made on 21st September 1904, were not drawn up till 27th February 1906. This delay in drawing up the orders was in accordance with the directions given by the Commissioner, whose intention appears clearly from his judgment to have been that the orders should not become operative until they were drawn up: compare *Tolson* v. *Jervis* [1]. It follows that at the date of the institution of the suit the insolvency proceedings were still in force, and the assets of all three insolvents still remained vested in the Official Assignee. The subsequent coming into force of these orders could not vitiate the institution of the suit, and it is clear that the Official Assignee was competent to bring the suit. He was also competent to continue it, at least so far as Hasambhai and Hajibhai are concerned, for the order of withdrawal, even after it became operative, was not effective to divest the Official Assignee and revest the property in these insolvents. This reasoning does not of course apply to the case of Fazalbhai, for when on the 27th February 1906 the order for

(1) (1845) 8 Beav. 364.

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the revocation of his adjudication was drawn up, it would, if there were nothing more in the matter, have operated to revest his assets in him on that date, and in that event the provisions of section 372, Civil Procedure Code, would be called into play. It is, however, not necessary to consider this point further at present, since the respondent replies to it, and the learned Judge below has found, that the effect of the consent decree of the 21st November 1904 was to empower the Official Assignee to maintain the suit on behalf of Fazalbhai as well as on behalf of his late partners.

I pass therefore to Mr. Inverarity's next argument that there never was an absolute revocation or an absolute withdrawal, but only an order contemplating revocation and withdrawal upon the fulfilment of certain conditions, which in fact have never been fulfilled. As we hold that a withdrawal, even if absolute and complete, would not have divested the Official Assignee of his interest in the properties of Hasambhai and Hajibhai, it will not be necessary to consider the special bearing of this argument upon their case. As regards the case of Fazalbhai, whose adjudication was revoked, we have come to the conclusion that, though the revocation was conditional, the conditions have been fulfilled. This finding is based mainly upon the terms of the orders which have already been referred to, and need not therefore be elaborated at any great length. It must be remembered that when these orders were drawn up, the present disputes were not foreseen and in our opinion it will be safest to construe them as a whole upon a general consideration of their provisions. So reading them, we have no doubt that they were originally, and always remained, conditional, and that the condition precedent to their operation was the payment of a sum sufficient for the six annas composition. The question is, was that condition *fulfilled?* Mr. Inverarity in contending for the negative has urged that the consent decree substituted for the orders of the Insolvency Court a totally different arrangement, which the Court has never approved; and he has pointed to the distinction that, whereas under the Rules absolute the insolvents were to pay to the trustee "a sum sufficient to pay a composition of six annas in the rupee", the consent decree directed the trustees to pay to the

Official Assignee a sum which, with the moneys already available in his hands *minus* costs and charges incurred or to be incurred, would suffice for the composition in question. The distinction is, no doubt, there, but upon a consideration of all the materials we do not think that it is entitled to the significance which the respondent desires to assign to it. The decree, which purports on its face to give effect to the orders of 21st September, was taken on 21st November, *i. e.*, the last day on which the amount required for the composition was payable, and on the same day the cheque for Rs. 1¼ lákhs was paid to Mr. Macleod. It is true that he treated it as paid to him as Official Assignee, but there appears to have been no reason why he could not have endorsed it over to himself as trustee on the same day. It is objected, moreover, that the sum was not sufficient to pay the composition within the meaning of the orders of the Insolvency Court, but would only become sufficient on being added to the moneys already in the Official Assignee's hands. As to this, if it were necessary to confine ourselves to the actual wording of the Insolvency Court's orders, we should be prepared to hold that those orders did not exclude the reckoning in of the moneys already with the Official Assignee; but, however that may be, it seems to us clear that Mr. Macleod accepted the payment as sufficient to pay to the creditors the six annas composition "in accordance," as the consent decree runs, "with the terms of the orders dated respectively the 21st day of September last." This being so, the plaintiff seeks to fall back upon the consent decree, and we must now, therefore, consider the question whether this decree had the effect of empowering the Official Assignee to maintain the suit on behalf of Fazalbhai even after the orders had been drawn up in February 1906. Mr. Justice Davar has held that the decree has this effect, and we are not disposed to differ from him. We think that as between the insolvents, the trustees and the Official Assignee, the decree embodies a contract under which the assets of the insolvents are not to vest in them, but are to be made over to the trustees by Mr. Macleod, as Official Assignee, in whom they are to remain vested for that purpose not only until a sum sufficient for the composition has been paid, but also until he is requested by the trustees to assign the assets to them. No such request has yet been made, and

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under the decree the trustees are entitled to ask the Official Assignee to continue to make recoveries on their behalf. It follows that the objection that Fazalbhai should have been a plaintiff fails by virtue of the decree; the Official Assignee is entitled to maintain this suit on his behalf; and as I have already said, even apart from the decree the Official Assignee is entitled to sue on behalf of Hasambhai and Hajibhai.

For the foregoing reasons our findings on the issues are:—

(1) The plaintiff is entitled to maintain this suit, and

(2) The plaintiff was entitled to file the suit.

The result is that the appeal must be dismissed with costs.

It remains to add that the appellant has stated that his reason for taking objection to the form of the suit is that if Hasambhai, Hajibhai and Fazalbhai are not parties to the suit, they might harass him with another action. The respondent is willing that they should be joined, and we therefore order that they be added as parties—as plaintiffs if they consent, and as defendants if they do not consent.

Attorneys for the appellant: *Messrs. Thakurdas & Co.*

Attorneys for the respondent: *Messrs. Payne & Co.*

B. N. L.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

NANA BIN ABA (ORIGINAL PLAINTIFF), APPLICANT, v. SHEKU BIN ANDU AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

1908. *January* 28.

Mámlatdárs' Courts Act (Bombay Act II of 1906), sections 7 and 23[1]*—Mámlatdárs' Courts Act (Bombay Act III of 1876), section 5*[2]*—General Clauses Act (I of 1904), section 7—Repeal of the Mámlatdárs' Courts Act (Bombay Act III of 1876) by the Mámlatdárs' Courts Act (Bombay Act II of 1906)—Suit commenced under the former Act—Effect of the latter Act.*

The plaintiff filed a suit on the 24th February 1906 under the Mámlatdárs' Courts Act III of 1876.

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* Application No. 179 of 1907 under extraordinary jurisdiction.

(1) Sections 7 and 23 of the Mámlatdárs' Courts Act (Bombay Act II of 1906) are as follows :—

7. All suits under this Act shall be commenced by a plaint, which shall be presented to the Mámlatdár in open Court by the plaintiff, and which shall contain the following particulars :—

(*a*) The name, age, religion, caste, profession and place of abode of the plaintiff ;

(*b*) The name, age, religion, caste, profession and place of abode of the defendant ;

(*c*) The nature and situation of the property of which possession or use is sought, or the nature of the injunction to be granted, as the case may be ;

(*d*) The date on which the cause of action arose ;

(*e*) The circumstances out of which the cause of action arose ; and

(*f*) A list of the plaintiff's documents, if any, and of his witnesses, if any, shewing what evidence is required from each witness, and whether such witnesses are to be summoned to attend, or whether the plaintiff will produce them on the day and at the place to be fixed under section 14.

23. (*1*) There shall be no appeal from any order passed by a Mámlatdár under this Act.

(*2*) But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit.

(*3*) Where the Collector takes any proceedings under this Act he shall be deemed to be a Court under this Act.

(2) Section 5 of the Mámlatdárs' Courts Act (Bombay Act III of 1876) was as follows :—

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On 26th January 1907 the Mámlatdár dismissed the suit with costs.

On the 12th March 1907 the plaintiff, under section 23 of the Mámlatdárs' Courts Act II of 1906, presented an application for revision to the Collector.

Under the Mámlatdárs' Courts Act III of 1876 the Collector had no power of revision.

Held, that having regard to the words of the Bombay General Clauses Act the Collector had no jurisdiction: to hold otherwise would be to affect a legal proceeding in respect of a right which had accrued under the old Act.

To disturb an existing right of appeal is not a mere alteration in procedure. *Gulam Rasul* v. *Balu Sayaji*[3] and *Vajechand Ramji* v. *Nandram Daluram*[4], not followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of L. J. Mountford, Collector of Sholápur, in a revisional application against the decree of D. N. Bhosekar, Mámlatdár of Bársi in the Sholápur District, in possessory suit No. 12 of 1906.

On the 24th February 1906 the plaintiff brought a possessory suit, No. 12 of 1906, against the defendants in the Court of the Mámlatdár of Bársi in the Sholápur District, under the pro-

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All suits under this Act shall be commenced by a plaint, which shall be presented to the Mámlatdár in open Court by the plaintiff, and which shall contain the following particulars:—

(1) The name, religion, caste, profession and place of abode of the plaintiff;

(2) The name, religion, caste, profession and place of abode of the defendant;

(3) The nature and situation of the property of which, or of the profits of which, possession or use is sought, or the nature of the injunction to be granted, as the case may be;

(4) The date on which the cause of action arose;

(5) The circumstances out of which the cause of action arose.

(6) A list of the plaintiff's documents, if any, or of his witnesses, and what evidence is required from each witness, and whether such witnesses are to be summoned to attend, or whether the plaintiff will produce them on the day and at the place to be appointed according to section 11 of this Act.

(3) (1907) 9 Bom. L. R. 527. (4) (1907) 31 Bom. 515.

visions of the Mámlatdárs' Courts Act (Bombay Act III of 1876), to recover possession of certain land, alleging that he, as tenant of one Anandrav Shivaji Kulkarni, had grown crops on the land and that the defendants had forcibly dispossessed him on the 18th January 1906.

Defendant 1 contended that he was the owner of the land; that he had mortgaged it to the said Anandrav Shivaji; that he had taken it from the mortgagee for cultivation under an oral agreement and that the period of his tenancy was to expire on the 25th March 1906.

Defendant 2 answered that he was a tenant of defendant 1.

Defendant 3 pleaded that he had nothing to do with the land in dispute.

While the suit was pending the Mámlatdárs' Courts Act (Bombay Act III of 1876) was repealed by the Mámlatdárs' Courts Act (Bombay Act II of 1906), which came into force on the 29th October 1906.

The Mámlatdár, on the 26th January 1907, dismissed the suit, holding that the plaintiff's possession within six months before the institution of the suit was not satisfactorily proved.

Against the decree of the Mámlatdár the plaintiff, on the 12th March 1907, presented a revisional application under section 23 of the Mámlatdárs' Courts Act (Bombay Act II of 1906) to the Collector of Sholápur, praying for the reversal of the Mámlatdár's decree. The Collector, on the 6th April 1907, held that the rights of the parties had been finally determined under the Mámlatdárs' Courts Act (Bombay Act III of 1876), and that he was not competent to entertain the application. He, therefore, referred the plaintiff to the High Court.

The plaintiff, thereupon, preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging *inter alia* that the Collector had, in refusing to entertain the revisional application, failed to exercise the jurisdiction vested in him by law, that it was an error to hold that it was not competent to the Collector to entertain the application under section 7 of the General Clauses Act (I of 1904), and that the Collector erred in holding that the new

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Mámlatdárs' Courts Act (Bombay Act II of 1906) did not govern the decision of the suit. A *rule nisi* was consequently issued, calling on the defendants to show cause why the order of the Collector should not be set aside.

N. V. Gokhale appeared for the applicant (plaintiff) in support of the rule:—The suit was instituted while the old Mámlatdárs' Courts Act was in force and the decree was passed after the new Act came into operation. Therefore the question is whether the Collector had jurisdiction to entertain our application for revision. We submit that he had. The *rule nisi* was granted on the authority of the rulings in *Gulam Rasul* v. *Bala Sayaji*[1] and *Vajechand* v. *Nandram*[2]. These authorities follow the principle that enactments relating to procedure are applicable to proceedings pending at the time they came into force unless there is anything to indicate a contrary intention. There was no provision in the old Act giving revisional powers to the Collector, while the new Act does specifically contain such a provision. We, therefore, submit that according to the rulings we rely on the Collector had jurisdiction to entertain our application for revision.

[JENKINS, C. J.:—The decisions you rely on are in conflict with the ruling of the Privy Council in *Colonial Sugar Refining Company* v. *Irving*[3]. Further, section 7 of the General Clauses Act is to be considered in this connection.]

If the word *right* in section 7 clause (c) of the General Clauses Act means and includes a right of appeal or revision or transfer or the right of suing in a particular Court, then the decisions referred to cannot be supported. But if *right* means a substantive right, then the right to sue in a Mámlatdár's Court is not such a right. It is only a right to the expeditious procedure of a Mámlatdár's Court and ought to be subject to the provisions of the new Act. No person has a vested right in any course of procedure and the right of prosecution of a suit or defence must be exercised in the manner prescribed by the law in force for the time being: Maxwell on Statutes, p. 314 (3rd Edn.).

(1) (1907) 9 Bom. L. R. 527. (2) (1907) 31 Bom. 545.
(3) [1905] A. C. 369.

In the case before the Privy Council, *Colonial Sugar Refining Company* v. *Irving*[1], the right of appeal to the Privy Council was sought to be transferred to a new tribunal and their Lordships held that it was tantamount to abolishing an appeal altogether. In the present case our right to invoke the revisional jurisdiction of the High Court has not been taken away at all. That right has remained intact. We have, under the new Act, acquired an additional right to ask the Collector to exercise his revisional powers under section 23 of the Act. Therefore the ruling of the Privy Council does not apply to the circumstances of the present case.

N. D Jathar appeared for the opponents (defendants) to show cause:—Besides the said Privy Council ruling there is another ruling in *Hurrosundari Dabi* v. *Bhojohari Das Manji*[2] which exactly meets the point and is on all fours with the present case. It lays down that the case should be governed by the old Act and not by the new Act which repealed the old Act. There is also another case which lays down the same principle: *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*[3].

Further, in section 7 clause (*c*) of the General Clauses Act the word *right* must mean and include a right of revision, appeal and transfer. That right is a substantive right because the decision does affect the merits of the case. If the Collector had entertained the plaintiff's application for revision and reversed the Mámlatdár's decree, we would have lost possession of the property and thus the exercise of jurisdiction by the Collector would have affected closely a substantive right. The word *right* in the General Clauses Act must, therefore, be construed as including a right of appeal. Thus, even in the light of the General Clauses Act, the Collector cannot be said to have jurisdiction in this matter. A right which was not in existence under the old Act with respect to proceedings held under that Act cannot be claimed although the new Act has conferred it.

JENKINS, C. J.:—This application for revision arises out of a suit commenced on the 24th February 1906 under the Mámlatdárs' Courts Act III of 1876.

(1) [1905] A. C. 369. (2) (1886) 13 Cal. 86.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 166.

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On the 29th of October 1906 the Mámlatdárs' Courts Act II of 1906 came into operation, and by section 2 of that Act, the Mámlatdárs' Courts Act III of 1876 was repealed.

On the 26th of January 1907 the Mámlatdár dismissed the suit with costs.

On the 12th March 1907, the plaintiff presented a petition for revision to the Collector of Sholápur.

On the 6th of April 1907 the Collector held that he had no jurisdiction to entertain the application.

The plaintiff considering himself aggrieved by the Collector's order has presented this application to the High Court for revision.

Under the Mámlatdárs' Courts Act of 1876 the Collector had no power of revision.

By section 23 of the Mámlatdárs' Courts Act of 1906 it is provided as follows :—"The Collector may call for and examine the record of any suit under this Act." Section 7 shows what a suit under this Act is; it says: "All suits under this Act shall be commenced" in the manner therein indicated, and there is a variation, though only a very slight one, from the requirements of section 5, the parallel section of the Mámlatdárs' Courts Act of 1876. So that on the words of the Act itself it cannot be said that we are now concerned with a suit under the Mámlatdárs' Courts Act of 1906. In the enquiry before us reference has been made to two decisions of this Court which, it is argued, govern this case.

The first of them is *Gulam Rasul* v. *Balu Sayaji* (1) where it was held that the Mámlatdárs' Courts Act of 1906 took away the Mámlatdár's jurisdiction over houses not falling within the description contained in section 5 of that Act with the result that the Mámlatdár had no jurisdiction to proceed with a suit brought in respect of such houses though commenced before the Act came into operation. It was there considered by the learned Judge that the case was governed by

(1) (1907) 9 Bom. L. R. 527.

the rule laid down in Maxwell that "No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the Court in which he sues." That decision was afterwards followed in *Vajechand* v. *Nandram*[1] and that decision would be binding on us unless it appears that it was opposed to the decision of a superior tribunal.

It appears to us that those decisions are opposed to previous binding decisions which apparently were not brought to the notice of the Court. Thus in *Colonial Sugar Refining Company* v. *Irving*[2] it was said: "As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment; and therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

That case shows that to disturb an existing right of appeal is not a mere alteration of procedure.

(1) (1907) 31 Bom. 545. (2) [1905] A. C. 369 at p. 372.

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Then again in *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*[1] a decision of a Full Bench, also apparently not cited, the Court had to consider the effect on a pending suit of an enactment which gave a different right of appeal, and it was there said: "A suit is a judicial proceeding, and the word 'proceedings' must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and therefore to include proceedings in appeal. It follows, in the judgment of the Court, that in all suits commenced before the passing of the Bombay Courts' Act, the procedure must (unless another mode of procedure is expressly substituted by that Act) be the same as it would have been if that Act had not been passed."

These cases are sufficient to justify us in treating the decisions in *Gulam Rasul* v. *Balu Sayaji*[2] and *Vajechand Ramji* v. *Nandram Daluram*[3] as not binding on us.

Now, turning for a moment to the Bombay General Clauses Act (I of 1904), we find it is there provided (section 7) as follows:—"Where this Act, or any Bombay Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not . . . . affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed . . . . or affect any investigation, legal proceeding or remedy in respect of any such right . . . . and any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . . as if the repealing Act had not been passed."

Now, the right in respect of which this suit is commenced was a right acquired under the Mámlatdárs' Courts Act of 1876, and his suit was commenced under that Act.

On the words of the Bombay General Clauses Act, therefore, it appears to us that it would be wrong to hold that the Collector had jurisdiction; so to hold would be to affect a legal proceeding in respect of a right which had accrued under the old Act.

(1) (1869) 6 Bom. H. C. R. (A. C. J.) 166 at p. 169.

(2) (1907) 9 Bom. L. R. 527.

(3) (1907) 31 Bom. 515.

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If authority be needed for this, then we think it is to be found in the decision pronounced by Mr. Justice Wilson in *Hurrosundari Dabi* v. *Bhojohari Das Manji*[1] which closely resembles in its circumstances the present case. What was there sought was to take advantage of a power of appeal given after the suit had been commenced. After referring to *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*[2] and two other similar cases, it was said: "These cases are on all fours with the present case, with this exception, that there an appeal was given under the repealed Act, and it was held that the repealing Act did not take away the appeal. Here the repealed Act excluded an appeal. It follows, on the same principle, that the repealing Act cannot give an appeal."

In the same way here we hold that the repealing Act cannot give the right of revision in respect of proceedings commenced under the Mámlatdárs' Courts Act of 1876.

In our opinion the Collector took the correct view and we must therefore discharge this rule with costs.

Rule discharged.

G. B. R.

(1) (1886) 13 Cal. 86. (2) (1869) 6 Bom. H. C. R. (A. C. J.) 166 at p. 169.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908. *January 30.*

MAHANT BIHARIDASJI GURU GOVINDDASJI (ORIGINAL PLAINTIFF), APPLICANT, v. PARSHOTAMDAS RAMDAS AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Civil Procedure Code (Act XIV of 1882), sec. 373—Withdrawal from suit—Application for withdrawal with liberty to bring fresh suit—Costs.

Section 373 of the Civil Procedure Code (Act XIV of 1882) contemplates a withdrawal not, of the suit, but, from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to with-

* Application under extraordinary jurisdiction No. 133 of 1907.

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draw from the suit with such liberty, then he must apply to the Court for permission to so withdraw.

Where a plaintiff does not desire to withdraw from the suit, unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of J. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 259 of 1903.

The plaintiff sued the defendants in the Court of the First Class Subordinate Judge of Surat for the recovery of certain ornaments, clothes or their value, account books and valuable documents relating to a temple and costs.

The evidence in the case was being recorded in another suit in the same Court and that other suit was dismissed for default. The plaintiff, thereupon, applied to have the present suit withdrawn with permission to bring a fresh suit. The Subordinate Judge recorded the following order upon the application :—

Suit may be withdrawn.

No permission need be granted as the amount in dispute is very small as compared with the main *corpus* of the endowment. The plaintiff is to bear all costs and to pay all costs. No special reason is shown to depart from the usual rule.

Against the said order the plaintiff preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging *inter alia* that the Subordinate Judge had no jurisdiction to pass the order as he did and that he should either have rejected the application and proceeded with the suit or have allowed the suit to be withdrawn with permission to bring a fresh suit. A *rule nisi* was issued requiring the defendant to show cause why the said order should not be set aside.

L. A. Shah appeared for the applicant (plaintiff) in support of the rule :—We applied for leave to withdraw from the suit with permission to bring a fresh suit and the Subordinate Judge refused to grant the permission to bring a fresh suit. So far he had jurisdiction to deal with the matter under section 373 of the

Civil Procedure Code. But he proceeded to make an order disposing of the suit as if the suit was withdrawn. He had no jurisdiction to make such an order. We had not withdrawn the suit and no order was called for under the second paragraph of section 373. The application was under the first paragraph of the section and it may have been granted or rejected, and, if rejected, the suit must be proceeded with.

Manubhai Nanabhai appeared for the opponents (defendants) to show cause:—The plaintiff made an application to withdraw from the suit with permission to bring a fresh suit. It was competent to the Subordinate Judge to grant or refuse the permission asked for. The permission having been refused without any objection on the part of the plaintiff he must be deemed to have withdrawn from the suit. The report of the Subordinate Judge gives the reasons why he refused the permission and his order should not be interfered with under section 622 of the Civil Procedure Code.

JENKINS, C. J.:—The application is made to us under section 622 of the Code of Civil Procedure, and it arises out of an application made to the Subordinate Judge under section 373 of the Code.

The whole difficulty arises from the omission to observe what are the provisions of section 373. It contemplates a withdrawal not of the suit but from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the Court to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw of his own motion and no order of the Court is necessary.

Now, in this case the Subordinate Judge has passed an order in these terms: "The suit may be withdrawn. No permission need be granted as the amount in dispute is very small compared with the main *corpus* of the endowment. Plaintiff is to bear all costs and to pay all costs. No special reason is shown to depart from the usual rule."

It is contended before us by the opponents, and the applicant accepts the contention, that the reference to costs is to the costs

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mentioned in the second paragraph of section 373. The plaintiff did not require leave to withdraw from the suit unless accompanied with liberty to bring a fresh suit, and, as the Subordinate Judge considered that he ought not to give that liberty, he ought simply to have dismissed the application. Now it is clear that he had no power to make the order he did as to costs unless plaintiff had withdrawn from the suit. But the plaintiff had not withdrawn from the suit. All he did was to apply to the Court for the permission to withdraw from the suit with liberty to bring a fresh suit. The Judge had no right to assume that the plaintiff had withdrawn from the suit when he refused to him the liberty which was the sole purpose of his application.

The rule accordingly will be made absolute with costs, and the order will be varied by substituting therefor an order in these terms: The application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject matter of the suit is dismissed with costs.

The result will be that the case must be restored to the file.

Rule made absolute.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *February 3.*

DURBAR KHACHAR SHRI ODHA ALA (ORIGINAL PLAINTIFF), APPELLANT, v. KHACHAR HARSUR OGHAD (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Debt—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree

The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son,

* Second Appeal No. 445 of 1907.

Held, that the son was not liable under Hindu Law under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any express provision of the law; but the result of the suit showed that it was wrongful, and for a liability so incurred the son could not be held answerable when the estate that had come to his hands had derived no benefit from the act.

Under Hindu Law, the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts *legitimately* incurred by his father; not for those attributable to his failings, follies or caprices.

SECOND appeal from the decision of Chimanlal Lallubhai, First Class Subordinate Judge, with A. P., at Ahmedabad, reversing the order passed by C. H. Vakil, Subordinate Judge at Dhandhuka.

Proceedings in execution.

The plaintiff's father obtained a decree against the defendant's father in Suit No. 27 of 1878, for damages caused by the latter on account of the obstruction caused by him in carrying water from a certain well to the plaintiff's lands.

In execution of this decree, the lands belonging to the defendant's father were attached in 1888. The decree was then transferred to the Collector for execution. The Collector instead of selling the lands, managed it and sent the net proceeds to the Court for payment to the plaintiff.

The defendant's father died in 1901. The plaintiff thereupon applied to have the name of the defendant (son of the judgment-debtor), placed on the record in place of that of his father. The defendant in answer to this contended that the decree being one for damages could not be executed against him.

The Subordinate Judge gave effect to the contention of the defendant and ordered the Darkhást to be dismissed. This decree was reversed on appeal; the learned Judge holding that the Darkhast should be restored to the file and the contentions of illegality and immorality raised by defendant should be decided on their merits.

On remand the Subordinate Judge held that the judgment-debt was not illegal or immoral and ordered execution to proceed against the defendant.

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On appeal the lower appellate Court held that the judgment debt was illegal, immoral and was not one for which the defendant as heir of his father was liable under the Hindu Law. He therefore ordered the Darkhast to be disposed of.

The plaintiff appealed to the High Court.

Scott (Advocate General) with *L. A. Shah*, for the appellant.

G. N. Thakore, for the respondent.

KNIGHT, J.—In 1878 a decree was obtained against the father of the present respondent. Certain *Túlukdári* lands of his were placed under attachment, and execution was thereafter effected through the instrumentality of the Collector, who retained the management of the lands in his hands and paid the decree-holder the profits accruing therefrom.

In 1901 the judgment-debtor died, the decree being still unsatisfied, and the estate passed to his son, the respondent, by survivorship. The decree-holder caused his name to be brought upon the record under section 234, Civil Procedure Code, as the legal representative of the judgment-debtor, and sought to proceed with the execution. But the respondent objected, *inter alia*, on the ground that the obligation embodied in the decree was one which did not bind him. This objection he was entitled to raise under section 244: see the similar case of *Umed Hathising* v. *Goman Bhaiji*[1].

After delays arising from remands and other causes, the lower appellate Court eventually held that the objection was good, and ordered the *darkhast* to be dismissed. Against this order the decree-holder has now appealed.

The decree was obtained for damages to the decree-holder's property caused by a dam erected by the judgment-debtor, which obstructed the passage of water thereto. The learned Judge of the Appeal Court has described that act, in words of perhaps unnecessary strength, as "illegal, wrongful and malicious." Looking to the account of the act on which he bases these epithets, we may define it as no more or less than a civil wrong. It was one which, the learned Judge finds, did not confer any

(1) (1895) 20 Bom. 385.

benefit upon the ancestral estate (or was not proved to have conferred any benefit); and these we must accept as the findings of fact in the case.

Now the question is whether the ancestral estate in the hands of the son may be held to the satisfaction of a decree so obtained against the father. Some confusion has obscured the discussion of questions of this nature owing to the inaccurate description of the paternal debts which the Hindu Law does not expect a son to pay as those which are tainted by illegality or immorality. From debts so tainted the son is indeed exempt; but the maxims of Hindu Law demand a less restricted interpretation than the words suggest. The texts are,—

Vrihaspati:—"The sons may not be compelled to pay sums due by their father for spirituous liquors, for losses at play, for promises made without consideration, or under the influence of lust or anger, or sums for which he stood surety, or a fine or a *toll*, or the balance of either (of these)", (Ch XI, 51).

Ushana:—"A fine, or the balance of a fine, likewise a bribe or a toll or the balance of it, are not to be paid by the son, neither shall he discharge improper debts." (*Mitakshara* II, 48—see Bhattacharya's *Hindu Law*, p. 247, Ed. 2).

The word translated *improper* in the concluding sentence of the latter text is *avyavahara*, which may perhaps be better rendered as *unusual*, or *not sanctioned by law or custom*. It is this word that has crept into our text books under the guise, or disguise, of *illegal* or *immoral*: and it will be seen that it really bears a wider significance. Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices.

Applying these maxims to the case before us, we must conclude that the son is not liable under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any

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express provision of the law; but the result of the suit shows that it was wrongful, and for a liability so incurred the son cannot be held answerable when the estate that has come to his hands has derived no benefit from the act.

It has been further contended that the suit in which the decree was passed was one which in virtue of the provisions of Act XII of 1855 could have been maintained against the son, and that *a fortiori* the execution of the decree against him can be prosecuted. This however is erroneous; for the act relates only to suits brought against the heirs of a deceased person for a wrong committed by the latter within the year preceding his death. As at the date at which respondent was brought upon the record many years had elapsed since the tort committed by the judgment-debtor, the decree-holder could not have derived, and cannot now derive, any advantage from the special provisions of this Act. Nor can we discern any force in the argument that the respondent is estopped from raising this objection by his acquiescence in the execution of the decree during the life-time of his father. The estate was then in his father's hands, and he was under no obligation to seek for a declaration that in the event of his father dying with the decree still unsatisfied execution could not proceed against himself.

For these reasons we must confirm the order of the lower appellate Court and dismiss the appeal with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

MAGNIRAM KHUPCHAND MARWADI (ORIGINAL PLAINTIFF), APPELLANT, *v.* LAXMINARAYEN RAMPRATAP MARWADI (ORIGINAL DEFENDANT), RESPONDENT.*

1908. *February* 6.

Accounts—Settled Accounts—Settlement of accounts by passing a promissory note—No fraud or coercion used—Waving of examination of accounts by plaintiff of his free will—Accounts not to be re-opened.

The plaintiff and defendant had mutual dealings and accounts. In settling these accounts, the plaintiff of his own free will and accord and without any fraud practiced or undue influence exerted by the defendant waived his right to an examination of the accounts for the purpose of ascertaining the balance due and agreed to treat a gross sum of Rs. 3,556 as due from him and accordingly executed a promissory note for that amount. The plaintiff then sued for a declaration that the promissory note in question was fraudulent and had been obtained from him by undue influence, and was good only to the extent of such sum as might be found due on taking account between the parties. At the trial, the allegations of fraud and undue influence on the part of the defendant and want of free consent on the part of the plaintiff were held not proved.

Held, that, on the principle enunciated by the Privy Council in *McKellar* v. *Wallace* (1), the promissory note must be treated either as the result of a settled account or as a settlement by compromise. In either case, it could not be re-opened.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, reversing the decree passed by Karpurram M., First Class Subordinate Judge at Ahmednagar.

Suit for a declaration that a certain promissory note was good only for the amount that might be found due on taking account between the parties.

The plaintiff alleged that there were dealings between him and defendant for a very long time. In May 1904, the defendant took the plaintiff to his (defendant's) shop and got from him a promissory note for Rs. 3,556 by fraud and threats and without showing accounts.

* Second Appeal No. 374 of 1907.

(1) (1853) 5 Moo. I. A. 372 at p. 395.

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The defendant in his written statement contended that the plaintiff's allegations were untrue and that he should not be allowed to go into the accounts.

The Subordinate Judge held that the amount actually due by the plaintiff to the defendant at the date of the note was Rs. 2,740-9-4; and that the promissory note was not passed by the plaintiff with free consent in the strictest sense. He, therefore, declared that the promissory note was good to the extent of Rs. 2,740-9-4 only.

Against this decree, cross-appeals were preferred to the District Court. The learned Judge in appeal came to the conclusion that there was no fraud or coercion used by the defendant on the plaintiff; he therefore dismissed the suit with costs.

The plaintiff appealed to the High Court.

B. N. Bhajekar for the appellant.

G. S. Mulgaonkar for the respondent.

CHANDAVARKAR, J.—The suit was brought by the appellant for a declaration that a certain promissory note executed by him in favour of the respondent agreeing to pay the sum of Rs. 3,555 had been fraudulently and by undue influence obtained from him, and was good only to the extent of such sum as might be found due on taking accounts between the parties. The respondent in his written statement denied the allegations of fraud, undue influence, and of want of free consent on the part of the appellant in the execution of the promissory note. Issues were raised on the question of fraud, undue influence, and free consent, and the Subordinate Judge who tried the suit held the allegations as to them proved Accordingly he re-opened the accounts between the parties and passed a decree in favour of the appellant.

On appeal by the respondent the learned District Judge has held the pleas of fraud, undue influence, and want of free consent not proved. And he has come to the conclusion that the promissory note in suit was executed by the appellant as being in substance the result of a compromise between the parties. It is true that in answer to the claim of the appellant, the respondent

did not in his written statement raise any defence based upon a compromise. But upon the facts found proved by the learned District Judge the transaction which led to the execution of the promissory note by the appellant must be held in law to be one in the nature either of a settled account or of a compromise. Those facts are that the parties had mutual dealings and accounts; that the appellant of his own free will and accord, and without any fraud practised or undue influence exerted by the respondent, *waived his right to an examination of the accounts* for the purpose of ascertaining the balance due and agreed to treat a gross sum—Rs. 3,556—as due from him and accordingly executed the note in dispute. To this the respondent consented. These facts bring the case within the principle of law enunciated by the Judicial Committee of the Privy Council in *McKellar* v. *Wallace*[1], where their Lordships say:—"If persons meet and agree, not to ascertain the exact balance; but agree to take a gross sum as the balance, a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be *errors in the account so settled, therefore, it is either an account* stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side."

Here the allegations of fraud, and undue influence on the part of the respondent and want of free consent on the part of the appellant have been held not proved. Under these circumstances

(1) (1853) 5 Moo. I. A. 372 at p. 395.

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the promissory note must be treated, on the principle enunciated by the Privy Council, either as the result of a settled account or as a settlement by compromise. In either case it cannot be re-opened. For these reasons we confirm the decree with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1901. *August* 10.

LAKSHMANDAS NARAYANDAS (ORIGINAL PLAINTIFF), APPELLANT, v. ANNA R. LANE (ORIGINAL DEFENDANT 1), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 586—Small Cause Suit—Character of the Suit—Second appeal—Framing issues—Exact words of the Legislature relating to issues—Contract Act (IX of 1872), section 231—Agent—Undisclosed principal—"Discloses himself"—Strict construction.

In determining whether no second appeal lies under the provisions of section 586 of the Civil Procedure Code (Act XIV of 1882) the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court.

Ramchandra Gopal v. Sadashiv Narayan(1) followed.

Where the rights in a case have to be determined by reference to the words of the Legislature then those words should be used for the purposes of the issues so far as circumstances permit.

Section 231 of the Contract Act (IX of 1872) deals with the rights (*a*) of the principal and (*b*) of the third party in cases where the contract is entered into by the agent without disclosing the principal. The first clause refers to the general case and the rule is that the third party shall have as against the undisclosed principal the same rights which he would have against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The second clause should be read as governed by the first clause.

The words "discloses himself" in section 231 of the Contract Act (IX of 1872) should be construed strictly.

Per BATCHELOR, J.:—It has been warmly urged that the third party's right to repudiate, which is allowed if the principal himself makes the disclosure, should not be refused merely because the disclosure is made by

* Second appeal No. 115 of 1901.

(1) (1885) P. J., p. 219.

some other person or the information reaches him from some other source. But the argument to my mind is not convincing. For whatever may be the subjective belief or conviction of the third party, it is conceivable that he should have no right to avoid the contract unless the principal, hitherto undisclosed, comes out into the open and claims the benefit of the contract for himself, and there would be no hardship in requiring the third party to challenge the alleged principal as to whether he makes this claim or not.

SECOND appeal from the decision of L. Crump, District Judge of Sátára, reversing the decree of Vaman M. Bodas, First Class Subordinate Judge.

Suit for specific performance of contract or in the alternative to recover damages.

The plaintiff alleged that on the 24th October 1901, defendant 1, Anna R. Lane, contracted to sell to him her bungalow in the Sátára Camp for Rs 1,800 and on the same day received from him rupees fifty as earnest money for which she passed a receipt; that the agreement was that she should receive the balance of the purchase money and execute in his favour a regular deed of sale before the 24th November following and put him in possession of the bungalow on or before the 8th November. The plaintiff further alleged that after the agreement he repeatedly asked defendant 1 to receive the purchase money and perform her part of the contract but in vain; that her failure to do so put the plaintiff to a loss of rent to the extent of Rs. 300 and that defendant 2, Ravji Ramchandra Kale, was joined because he was in possession of the bungalow and had knowledge of the agreement in suit.

The plaintiff, therefore, prayed for (1) specific performance of the contract of sale, (2) for possession of the bungalow and (3) Rs. 400 as damages in case specific performance could not be decreed for any reason.

Defendant 1 contended that one Ganpatdas Hirachand Devi tried for many days to purchase the bungalow but she could not be induced to sell it to him; that the plaintiff offered to purchase, apparently for himself through a house agent named DeSouza, but she learnt afterwards that he was really purchasing for Ganpatdas, that on the 30th October 1901, he sent her a letter

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embodying terms different from those originally settled; that she at once informed him that the original agreement was void and he was not entitled to fall back upon it and sue to enforce it; that after the agreement with the plaintiff was thus cancelled, she conveyed all her interest to defendant 2 under a registered deed of sale and put him in possession of the bungalow; that having regard to the provisions of the Specific Relief Act and particularly to section 28, the plaintiff's conduct was not such as entitled him to the relief claimed; that the plaintiff was not entitled to claim damages; that there was no valid contract with the plaintiff and the receipt produced by him was not admissible in evidence and that as the plaintiff had not deposited the purchase money in Court the suit should be dismissed.

Defendant 2 answered, *inter alia*, that the plaintiff was not entitled to any relief as against him with respect to damages or possession, that his purchase being *bonâ fide* for valuable consideration under a registered document and accompanied with possession the plaintiff had no superior right to possession, that the receipt produced by the plaintiff was inadmissible in evidence for want of registration and any right claimed thereunder was inferior to that which was created by his sale-deed, that the agreement alleged by the plaintiff was not such as could be specifically enforced against him and that Ganpatdas Hirachand Devi, who was the person really interested in the litigation, was a necessary party.

The Subordinate Judge found that the agreement in dispute was proved to have been made between plaintiff and defendant 1, that defendant 1 did subsequently rescind the agreement but she had no right to do so, that the plaintiff was not entitled to the specific performance of the agreement, that having regard to the circumstances of the case the discretion to grant specific relief could not be exercised in plaintiff's favour, that defendant 1 did not intend or desire to sell the property to Ganpatdas Hirachand Devi, that the defendants had not proved that the plaintiff wanted to purchase the property not for himself but for Ganpatdas Hirachand Devi and that the plaintiff was entitled to recover Rs. 100 as damages from defendant 1. The Subordinate Judge, therefore, passed a decree to that effect.

Defendant having appealed the Judge reversed the decree and dismissed the suit holding that it was proved that the plaintiff was acting for Ganpatdas Hirachand Devi and that the defendant was, therefore, justified in refusing to complete the sale.

The plaintiff preferred a second appeal.

Young (with *D. A Khare*) appeared for the appellant (plaintiff):—The broker DeSouza was, no doubt, our agent but our contract with defendant 1 became complete as soon as she received the earnest money She cannot now repudiate the contract under section 231 of the Contract Act on grounds which cannot legally be urged. There is no evidence in the case that DeSouza was the agent of Ganpatdas, and it is admitted that respondent acted merely on a rumour to that effect. If specific performance cannot be granted we are entitled to at least damages for breach of contract.

Lowndes (with *B N Bhajekar*) for respondent (defendant 1):—So far as we are concerned plaintiff's conduct was tainted with fraud. He kept Ganpatdas in the back ground and gave us to understand that he was buying the property himself. But the real fact was not so. He wanted to buy the bungalow for Ganpatdas to whom we did not wish to sell it. On these facts the Judge held that we were entitled to rescind the contract, *Smith* v. *Wheatcroft*[1]. The finding of the Judge that the plaintiff was in fact the agent of Ganpatdas is a finding of fact and binding in second appeal.

The second clause of section 231 of the Contract Act should bear a liberal construction. The expression "if the principal discloses himself" should be construed to mean, if the principal is disclosed by some means or other.

No second appeal can lie. Though originally the suit was for specific performance or in the alternative for damages, the relief that is now claimed is with respect to damages only, and the sum claimed being less than Rs. 500, section 586 of the Civil Procedure Code applies.

Young in reply:—Second appeal lies. In order to determine the nature of the suit, the relief originally claimed in the plaint

(1) (1878) 9 Ch. D. 223.

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must be taken into consideration and not the altered condition of the suit after certain findings arrived at by the lower Courts: *Ramchandra* v. *Sadashiv*[1].

The expression "if the principal discloses himself" in section 231 of the Contract Act means, if the principal himself comes forward. The expression is not capable of any other meaning.

BATCHELOR, J:—The suit out of which this appeal has arisen was brought for specific performance of a contract of sale and for possession of the bungalow in suit, or, in case specific performance was refused, for a sum of Rs. 400 as damages for breach of the contract. The Subordinate Judge rejected the prayer for specific performance, but awarded plaintiff Rs. 400 as damages together with Rs. 50 earnest money deposited. On appeal the District Judge of Sátára dismissed plaintiff's suit entirely.

The first point which it is necessary to decide here is whether a second appeal will lie. Mr. Lowndes in contending for the negative relies upon section 586, Civil Procedure Code, and argues that, as a consequence of the history of the litigation, the suit should now be regarded as a suit cognizable by a Court of Small Causes where the value of the subject matter does not exceed Rs. 500. But it appears to me that this argument takes too narrow a view of section 586. That section, as I read it, contemplates rather the original character of the suit than the character which it may subsequently assume by operation of the findings of the Courts. This is the view which was taken by this Court in *Ramchandra Gopal* v. *Sadashiv Narayan*[1] and there appears to be no reason to depart from it. It follows that this appeal is competent.

This brings me to the main point which has formed the subject of argument, namely, whether the respondent was entitled on the facts found to annul the agreement with the appellant. The facts found are that the bargain was made by the broker DeSouza as agent of the appellant; that the appellant was in fact acting on behalf of another person, one Ganpatdas, who was the owner of a neighbouring property and who had previously offered for this house a larger sum than respondent agreed to

(1) (1887) P. J., p. 219.

accept from DeSouza; and that, before the completion of the contract, DeSouza admitted to respondent that the real purchaser was Ganpatdas. Upon these facts the lower appellate Court has held that, under section 231 of the Contract Act, the respondent was entitled to avoid the agreement with the appellant. Before examining the accuracy of this opinion it seems necessary to observe that the issue raised on the point by the learned District Judge was defective and incorrect. For it was not sufficient to inquire whether "plaintiff was acting for Ganpatdas"; the fact to be ascertained was whether plaintiff was the agent of Ganpatdas so as to attract those legal consequences and incidents which attach to the special relation between agent and principal. It is very desirable that in framing issues the Courts should adhere strictly and faithfully to the exact words of the enactment with reference to which the issues are raised. Here, however, the point need not be further pursued, as it is plain that the issue, though faultily drafted, was correctly understood by all the parties.

To return to the question of the operation of section 231 of the Contract Act, I think that it must be interpreted in the light of the preceding and succeeding sections of the Act, which deal with the effects of agency on contracts made with third persons. Sections 226, 227 and 228 lay down the law as to how far the principal is bound by the contract of his agent. Section 229 continues the same subject and specifies the cases in which the principal will be held to be bound by any notice or information received by the agent. Section 230 describes how far the agent is entitled personally to enforce a contract made by him on behalf of his principal. Then comes section 231, which deals with the rights (*a*) of the principal and (*b*) of the third party in cases where the contract is entered into by the agent without disclosing his principal. It is with the rights of the third party that I am now concerned, and these rights are thus defined by the section. Under the first clause we have the general case, and there the rule is that the third party shall have as against the undisclosed principal the same rights which he would have had as against the agent if the agent had been the principal. The second clause deals with the particular case

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where the principal discloses himself before the contract is completed. I have no doubt, that, as suggested by Mr. Justice Rampini in *Karim Chowkidar* v. *Sundar Bewa*[1], this second clause should be read as governed by the preceding clause, which is restricted to cases where "an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent." In such cases, then, the third party may refuse to fulfil the contract upon proof that he would not have entered into it if he had known who was the principal or if he had known that the agent was not a principal, provided that "the principal discloses himself before the contract is completed." Here I would call attention to the grammatical form of the words "discloses himself," for in my judgment they must be construed strictly. I cannot concede the argument that they should be read to mean no more than would be expressed by some such phrase as "is disclosed," or "appears upon the scene." If that had been the intention, I conceive that there would have been no difficulty in expressing it clearly, and that the Legislature would not have adopted a form of words which on their face restrict and confine the meaning. It has, indeed, been warmly urged by Mr. Lowndes that the third party's right to repudiate, which is allowed if the principal himself makes the disclosure, should not be refused merely because the disclosure is made by some other person or the information reaches him from some other source. But the argument to my mind is not convincing. For, whatever may be the subjective belief or conviction of the third party, it is conceivable that he should have no right to avoid the contract unless the principal, hitherto undisclosed, comes out into the open and claims the benefit of the contract for himself, and there would be no hardship in requiring the third party to challenge the alleged principal as to whether he makes this claim or not. This construction appears to derive support from a comparison of the language used in the first and second clauses. In the first clause are defined the third party's rights where he "neither knows nor has reason to suspect" that he is contracting with an agent,

(1) (1896) 24 Cal. 207 at p. 210.

while in the second clause this comprehensive language is abandoned, and is replaced by the narrower and stricter phrase requiring that the principal shall "disclose himself." In my opinion, therefore, these latter words must be interpreted strictly.

But whether or not the clause should receive the restricted construction which I have suggested, it clearly cannot be stretched so as to cover the present respondent's repudiation. For it is not shown that DeSouza was the agent of Ganpatdas, and the alleged admission was made behind the back of Ganpatdas after the termination of whatever authority DeSouza had even as appellant's broker Thus, assuming Ganpatdas to have been the real purchaser, it is impossible to hold that he *disclosed himself within the meaning of the section so as to* entitle respondent to refuse to fulfil the contract.

Upon this finding it is unnecessary to consider, and I therefore refrain from considering, the further question whether the respondent has shown, within the meaning of the clause, that she would not have entered into the contract if she had known who the principal was, or that the agent was not a principal.

The result is that the decree under appeal is not, in my opinion sustainable. The District Judge has not found to what damages appellant would be entitled, and the parties have the right to obtain his finding on this point.

I would therefore reverse the decree of the lower appellate Court and remand the appeal for a finding as to the amount of damages which should be awarded to appellant. Respondent to bear all costs throughout.

JENKINS, C. J.—I concur.

Decree reversed. Case remanded.

G. B. R.

Note—The report of this case was held over by request pending proposed proceedings which however have not resulted in any decision affecting this report [Ed.]

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Act I of 1906 [Indian Tariff (Amendment)] ... In Urdu. 3p. (1a.)
Ditto ... In Nagri. 3p. (1a.)
Act III of 1906 (Coinage) ... In Urdu. 3p. (1a.)
Ditto ... In Nagri. 9p. (1a.)
Act V of 1906 (Stamp Amendment) ... In Urdu 3p. (1a.)
Ditto ... In Nagri 3p. (1a.)
Act VII of 1906 (Excise Amendment) ... In Hindi. 3p. (1a.)
Act III of 1907 (Provincial Insolvency) ... In Urdu 1a. 6p. (1a.)
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Act IV of 1907 [Repealing and Amending (Rates and Cesses)] ... In Urdu. 3p. (1a.)
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ABLE OF CASES REPORTED.

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 335—*Limitation Act* (XV

Held, on second appeal by plaintiff 1, that the suit was not time-barred under Article 11, Schedule II, of the Limitation Act (XV of 1877) as the minors were not "efficiently represented."

Padmakar Vinayak Joshi v. *Mahadev Krishna Joshi* (1885) 10 Bom. 21, followed.

The withdrawal of V. by default from the obstruction proceedings was designed by him (as appeared from the circumstances) in order to deprive the minors *of an opportunity of being heard* The minors had no opportunity of protecting their interest which V. had abandoned without notice to them or to any one on their behalf

SHIDAPA v. VENKAJI ... ... (1908) 32 Bom. 401

...e family—The remaining Law—Manager—Powers ...ief Act.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 373

CONSTRUCTION OF DOCUMENTS—*Documents executed in the mofussil—Contracts of the people of India—Liberal construction—Regard to be had to all ... for payment* Documents Council in ree (1856) 6 ought to be liberally construed. The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses."

Where having regard to all the circumstances of a transaction there remains no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the debt mentioned therein, the documents create a charge.

JANARDAN v. ANANT .. .. (1908) 32 Bom. 386

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while in the second clause this comprehensive language is abandoned, and is replaced by the narrower and stricter phrase requiring that the principal shall "disclose himself." In my

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while in the second clause this comprehensive language is abandoned, and is replaced by the narrower and stricter phrase requiring that the principal shall "disclose himself." In my opinion, therefore, these latter words must be interpreted strictly.

But whether or not the clause should receive the restricted construction which I have suggested, it clearly cannot be stretched so as to cover the present respondent's repudiation. For it is not shown that DeSouza was the agent of Ganpatdas, and the alleged admission was made behind the back of Ganpatdas after the termination of whatever authority DeSouza had even as appellant's broker. Thus, assuming Ganpatdas to have been the real purchaser, it is impossible to hold that he disclosed himself within the meaning of the section so as to entitle respondent to refuse to fulfil the contract.

Upon this finding it is unnecessary to consider, and I therefore refrain from considering, the further question whether the respondent has shown, within the meaning of the clause, that she would not have entered into the contract if she had known who the principal was, or that the agent was not a principal.

The result is that the decree under appeal is not, in my opinion sustainable. The District Judge has not found to what damages appellant would be entitled, and the parties have the right to obtain his finding on this point.

I would therefore reverse the decree of the lower appellate Court and remand the appeal for a finding as to the amount of damages which should be awarded to appellant. Respondent to bear all costs throughout

JENKINS, C. J.—I concur

Decree reversed. Case remanded.

G. B. R.

Note.—The report of this case was held over by request pending proposed proceedings which however have not resulted in any decision affecting this report. [Ed.]

ORIGINAL CIVIL.

Before Mr. Justice Davar.

AYESHABAI, WIDOW, PLAINTIFF, *v* EBRAHIM HAJI JACOB AND ANOTHER, DEFENDANTS.*

1908.
January 17.

Will—Executor—Intermeddling with estate—Degree of interference necessary to charge executor—Suit for account against executor—Account on footing of wilful default—Practice—Limitation—Limitation Act (XV of 1877), section 10, schedule II, Art. 120.

In law a very small interference or intermeddling with the estate of his testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor.

[illegible] or cannot renounce [illegible] having once acted, [illegible] to be sued in the the subsequent renunciation is void, and he [illegible] character of an executor

Rogers v. *Frank* (1), followed.

Modern practice allows of an order charging wilful default being made at any time during the action on a proper case being shown.

The plaintiff brought a suit against the executors of the will of her grandfather, praying for a declaration that she was absolutely entitled to the property of her grandfather and for an account of the property in the hands of the executors. The plaintiff claimed as heir and not under the will

Held, she was only entitled to accounts for six years preceding the suit as she took no interest in the property under the will, and the executors were not trustees for *her* and the property did not vest in them for any specific purpose in her favour. Such a suit is not a suit for the purpose of *following such property in the hands of the executors and trustees.*

THIS was a suit filed by the plaintiff Ayeshabai praying that it might be declared that she was absolutely entitled to the property moveable and immoveable left by her grandfather Haji Cassum Sooleiman deceased, that the defendants might be ordered to account for all the abovementioned property come into their hands and for the rents and other income of the same, and that they might be ordered to deliver possession to the plaintiff of the said property together with accretions thereto and the title deeds.

* Suit No. 221 of 1905.
(1) (1827) 1 Y. & J. 409.

The said Haji Cassum Sooleiman, a Cutchi Memon, died on 21st October 1894, leaving, surviving him as his heirs his widow Fatmabai, one son Haroon, a grandson Aboobakar, and a granddaughter Ayeshabai, the plaintiff.

By his will Haji Cassum Sooleiman appointed his brother Rahimtoola Sooleiman and his grandnephew Ebrahim Haji Jacob, the first defendant, his executors and trustees. He devised and bequeathed all his property moveable and immoveable to trustees in trust that they should enter into and remain possession of rents and profits and should pay Rs. 50 per mens for the maintenance of the said Fatmabai, the said Haroon his wife Hawabai and the said Aboobakar until the death of last survivor of them, and that upon the death of such survivor the trustees should convey the said immovea properties absolutely to the child or children of the s Aboobakar.

Aboobakar died in December 1895 intestate and unmarried.

Haroon died in October 1896 leaving a widow, Hawabai, a a daughter, the plaintiff.

His widow Fatmabai died in August 1897.

Hawabai, the widow of Haroon, died in August 1899.

The plaintiff claimed that on the death of Hawabai she beca absolutely entitled to the properties left by her grandfather.

Rahimtoola Sooleiman died in January 1903 leaving a wido Ayeshabai, the second defendant. The first defendant denied th he ever took possession of any of the testator's properties eith by himself or by others, but he was willing to account for t property after the death of Rahimtoola Sooleiman.

The second defendant denied the plaintiff's right to dema accounts for a period previous to six years from the date of the su

Bahadurjee with *Raikes* for plaintiff:—Only a very slight act intermeddling by an executor will amount to acceptance of offic see Williams on Executors, Vol. II, p. 1434, note (*k*) (10 edition). See *Cummins* v. *Cummins*[1], *Suddasook Kootary* v. *Ra Chunder*[2].

[1] (1845) 8 Ir. Eq. Rep. 723

[2] (1890) 17 Cal. 620.

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If the first defendant has not received what he ought to have received by due diligence he is liable *de son tort*. We demand an account on the footing of wilful default. *Mayer* v. *Murray*[1]. Where case of wilful default is made out an account on the footing of wilful default can be directed: Williams on Executors, Vol. II, p. 1510 (10th edition). See judgment of Fry, J., in *Barber* v. *Mackrell*[2]. If, on taking accounts before the Commissioner, a case of wilful default is *primâ facie* made out the Court can, on further directions, order accounts on footing of wilful default. *In re Symons*[3].

Scott (Advocate General) and *Strangman* for defendant 1:—We are only liable to account from January 1903: see Williams on Executors, pp. 1291—1445 (10th edition). They also referred to Seton on Decrees, Vol. II, p. 1162 (6th edition), and *In re Brier*[4].

Padshah with *Wadia* for defendant 2:—Referred to *Hemangini Dasi* v. *Nobin Chand Ghose*[5], *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee*[6], *Shapurji Nowroji Pochaji* v. *Bhikaji*[7], *The Advocate General of Bombay* v. *Bai Punjabai*[8].

DAVAR, J. —The plaintiff seeks in this suit a declaration that she is absolutely entitled to the property both moveable and immoveable left by her grandfather Haji Cassum Sooleiman, a Cutchi Memon merchant of Bombay, who died on the 21st of October 1894, and prays that the defendants may be ordered to deliver up possession of the said property to her. She further prays that the defendants may be ordered to account for all the property of Haji Cassum come into their hands and for the rents and income thereof.

Previous to his death the said Haji Cassum on the 31st of July 1894 made a will, whereby he purported to make certain dispositions of his property. He left a widow, Fatmabai, who died in 1897—a son Haroon, who died in October 1896—a grandson, Aboobakar, who died in December 1895. Haroon's widow Hawabai died in August 1899. The plaintiff is a daughter of

(1) (1878) 8 Ch. D. 424 at p. 427.
(2) (1879) 12 Ch. D. 534 at p. 539.
(3) (1882) 21 Ch. D. 757.
(4) (1884) 26 Ch. D. 238.
(5) (1882) 8 Cal. 783 at p. 807.
(6) (1880) 5 Cal. 910.
(7) (1886) 10 Bom. 242.
(8) (1891) 15 Bom. 551.

the testator's son Haroon. She contends that in the events that have happened she is now absolutely and solely entitled to the whole of the property left by her grandfather Cassum Sooleiman. Under the will she takes no interest in the estate of the testator. Some of the provisions of the will are said to be invalid as being in favour of unborn children of the testator's grandson Aboobakar. The plaintiff's right to succeed to all the property of Cassum Sooleiman is not disputed or challenged and therefore it is unnecessary to discuss any further the provisions of the will.

By the will the testator appointed his brother Rahimtulla Sulliman and his grand-nephew Ebrahim Haji Jacob, the first defendant herein, the executors thereof It is not disputed that Rahimtulla during his life-time managed the property of the testator. He died on the 13th of January 1903. The second defendant is his widow and heir. She has been adjudged a lunatic since the institution of the suit Her counsel does not dispute her liability to account to the plaintiff in her capacity of heir to her deceased husband. The only question submitted by him to the Court is whether the plaintiff's right to ask for accounts for a period previous to six years from the date of the institution of the suit is not barred by the law of limitation. He admits her liability to account for her husband's management as his heir, from a date beginning with six years previous to the institution of the suit up to the date of the death of her husband. It is not alleged that she was in possession of the testator's estate after her husband's death.

The first defendant originally and in his written statement denied all liability to account. In his written statement he says "he never took possession of any of the testator's properties either by himself or with others", and submits that the plaintiff "is not entitled to any of the reliefs prayed as against him." At the hearing, it seems, wiser counsel prevailed, and the Advocate General said he was willing to account after the death of Rahimtulla. His case is that after Rahimtulla's death the testator's property was managed by two sons of Abdulla, a son of the testator's brother, Noor Mahomed, who is supposed to have been

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adopted by Rahimtulla. It was stated on his behalf that the accounts were regularly and properly kept by these two young men and he was willing to adopt them and render accounts to the plaintiff after Rahimtulla's death. His counsel, however, have denied his liability to account during Rahimtulla's life-time. His case is that during Rahimtulla's life-time he was not in possession and management of the estate of the testator and that he had not accepted the office of executor at all events till Rahimtulla's death. The Advocate General however admitted that his client had intermeddled only in one respect during Rahimtulla's life-time. This was by joining in filing a suit. This admission does not stand by itself. This defendant's cross-examination and the entries from the books put in at the hearing prove that he joined Rahimtulla in giving a power-of-attorney as the executor of the will of Cassim Sulleman to one Haji Ebrahim Haji Adam to file or continue a suit at Karáchi in respect of the testator's property. This was in 1896. The defendant's answers were very evasive at times and he took refuge in the statement that Rahimtulla was like his grand-father and he merely did what Rahimtulla directed him to do. The plaintiff being a woman is not of course conversant with the details of the management of her grand-father's estate and I feel that the first defendant could tell a great deal more than what he has chosen to state in the witness-box and that his memory is not so bad as his answers indicate. Whatever may be the true facts, this one act of his is clearly established. He knew all about what he was doing when in 1896 he gave a power-of-attorney as executor jointly with Rahimtulla. He appears to have gone to the Solicitors' office and paid the late Mr. Turner his fees for preparing the power. He must be taken to have jointly filed or continued a suit for the purpose of recovering the property of his testator. Is this one act, which is proved, sufficient to charge him with a liability to account as executor? In my opinion this act is a clear indication that at all events about this time the first defendant accepted the office of executor. This power seems to have been executed somewhere about the 17th of August 1896, as appears from the dates of the entries. See Exhibit L

In law a very small interference or intermeddling with the estate of his testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor. In Williams on Executors, 10th edition, 1905, at page 199, it is stated:—"An executor who has intermeddled cannot subsequently renounce;" and at page 1434, Note (*k*), it is stated that "a very slight act of intermeddling by the executor will amount to the acceptance of the office of executor."

In *Rogers* v. *Frank* [1], Lord Chief Baron Alexander holds that an executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it and that having once acted the subsequent renunciation is void and he continues liable to be sued in the character of an executor. In this view Barons Garrow and Vaughan concur.

I hold on the evidence before me that the first defendant accepted office as executor under the will of Cassim Sulleman in August 1896 and that he is accountable as such executor from that time.

By her amended plaint the plaintiff claimed an account against the first defendant on the footing of wilful default. Her counsel at the hearing attempted to make out a case for a reference to the Commissioner on that footing, but he did not succeed in placing before the Court any materials which would justify the Court in making a reference on the footing of wilful default and he asked the Court in the end to reserve to him liberty to apply to the Court for directions to have the account taken on the basis of wilful default against the first defendant if he is able to gather sufficient materials for that purpose while the accounts are being taken before the Commissioner. No special leave seems to be necessary to make this application. Modern practice allows of an order charging wilful default being made at any time during the action on a proper case being shown. See Williams on Executors (10th edition), p. 1626, and Note (*t*) on the same page. If such leave, however, is necessary I have no hesitation in granting it having regard to the fact that the acts complained of against the first defendant related to the manage-

(1) (1827) 1 Y. & J. 409.

ment of the Worlee property on the assumption that the whole of the property belonged to the testator. This question as to whether the whole of the Worlee property belonged to the testator as contended by the plaintiff or only a moiety thereof as contended by the first defendant was partly gone into before me at the hearing. Mr. Bahadurji at one time insisted on this question being gone into before the Court and in this suit. The first defendant contended that a moiety of the Worlee property belonged to the estate of his grand-father Moledina, a brother of the testator Cassum Sulleman. It was pointed out that the heirs of Moledina were not parties to this suit and no decision I would give in this suit would bind them, but Mr. Bahadurji insisted at first and stated that in order to establish his right to have accounts taken on the footing of wilful default it was necessary that he should prove that the whole of the Worlee property belonged to his client's grand-father and now belonged to the plaintiff.

Plaintiff's counsel, however, realised the difficulties in his way in establishing his title to the whole of the property in this suit and at that stage and before the conclusion of the case he asked permission to withdraw the first issue with liberty to him to file a separate suit against Moledina's heirs to establish his client's right to the moiety of the Worlee property claimed by them. This application the defendants' counsel did not oppose and it seems to me that that is the proper course to be followed. I do not think anything done in this suit will preclude her from filing a suit against Moledina's heirs even if I did not give her liberty, but to avoid all possible controversy I do so.

The only other question that remains to be discussed is that of limitation. Is the plaintiff entitled to claim accounts against the defendants for a longer period than six years previous to the date of the filing of this suit? Mr. Bahadurji contends that there is no period of limitation applicable to his claim and relies on section 10 of the Limitation Act. Defendants' counsel contended that the claim to accounts previous to the six years preceding the filing of the suit is barred under Article 120 of the Second Schedule to the Act. In approaching the considera-

tion of this question I had my sympathy entirely with the plaintiff. Looking at the papers and proceedings in this case I find that the plaintiff has not been treated with either candour or fairness. She has been kept at arms length and the first defendant's attitude towards her has been far from friendly. There is a good deal of force in Mr. Bahadurji's complaint at the way in which she has been treated. My inclination was to give her all the accounts her counsel so strenuously fought for but I am unable to do so in the face of the authorities which are too strong to enable me to give the plaintiff the accounts for a period previous to the six years preceding the filing of the suit. The first defendant is not—nor was Rahimtulla a trustee for her—they are trustees under the will and she takes no interest in the estate of their testator under the will. The property of the testator did not "become vested in them in trust for any specific purpose" in the plaintiff's favour and her suit cannot be said to be a suit "for the purpose of following in their hands such property" according to the interpretation put upon these words by the decided cases.

In *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee* [1], White, J., in delivering the judgment of the Court, says :—

"In India, suits between a *cestui que trust* and trustee for an account seem to be governed solely by the Indian Limitation Act, and unless they fall within the exemption of section 10 are liable to become barred by some one or other of the Articles in the second schedule of the Act. To claim the benefit of s. 10, the suit against the trustee must (amongst other things) be for the purpose of following the trust property in his hands . . . It is plain that its object is not to recover any property in *specie*, but to have an account of the defendant's stewardship, which means an account of the money received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him on taking the account."

Mr. Bahadurji tried to distinguish this case from the one before me by contending that in this case the plaintiff claimed both property *and* account, but the distinction, if any, disappears in the

(1) (1880) 5 Cal. 910 at p. 914.

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(1) (1880) 5 Cal. 910 at p. 914.

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light of the case of *Hemangini Dasi* v. *Nobin Chand Ghose*[1] where plaintiff submitted that certain of the trusts and provisions of the will in that case were invalid in law, that consequently a large portion of the testator's property remained undisposed of at his death and she claimed a share of this residue as one of the heirs of the testator. She also claimed accounts. Mr. Justice Field, after giving to the plaintiff her share in the property, says at page 807 :—

"Then, as to the account asked in respect of the Hadul property, we think that the plaintiff is entitled to such account for six years only preceding the institution of the present suit, upon the authority of the case of *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee*." In *Shapurji Nowroji Pochaji* v. *Bhikaji*[2] Mr. Justice Scott held that a suit which was *primarily* not a suit to follow trust property in the hands of a representative of a trustee was barred by Art. 120 of the Second Schedule of the Limitation Act. He follows the case of *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee*[3] and I think he meant to follow the case of *Hemangini Dasi* v. *Nobin Chand Ghose*[4], but by some mistake in the report the reference is given to another case of *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*[5].

Mr. Justice Parsons' decision in *Nanalal Lallubhoy* v. *Harlochand Jagusha*[6] and Mr. Justice Farran's decision in the *Advocate General of Bombay* v. *Bai Punjabai*[7] are to the same effect. In the latter case in the course of his judgment, Mr. Justice Farran refers to the cases of *Saroda Pershad Chattopadhya* v. *Brojo Nauth Bhuttacharjee*[8] and *Shapurji Nowroji Pochaji* v. *Bhikaji*[9] and follows them.

In *Mathuradas* v. *Vandrawandas*[10] Mr. Justice Batchelor holds that s. 10 of the Limitation Act does not apply to a resulting trust.

(1) (1882) 8 Cal. 788.
(2) (1885) 10 Bom. 212.
(3) (1880) 5 Cal. 910.
(4) (1882) 8 Cal. 788.
(5) (1882) 8 Cal. 819.
(6) (1889) 14 Bom. 476.
(7) (1894) 18 Bom. 631.
(8) (1880) 5 Cal. 910.
(9) (1885) 10 Bom. 212.
(10) (1907) 31 Bom. 222; 9 Bom. L. R. 328.

These cases cited at the Bar leave no doubt in my mind that the plaintiff is not entitled to claim exemption under s. 10 of the Limitation Act. The question however becomes perfectly clear by the language of the judgment of the Privy Council in the case of *Balwant Rao* v. *Puran Mal*[1].

The judgment of the Privy Council says:—

"Their Lordships are of opinion that the expression used by the Legislature 'for the purpose of following in his or their hands such property' means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section."

Plaintiff does not sue to recover property *for* the trust created by the will of her grandfather: she seeks to recover the property for herself and in doing so she claims an account from the persons in possession. Her right to sue for the whole of the testator's property accrued when the last beneficiary under the will—the testator's daughter-in-law, Hawabai—died in August 1899. Her plaint was admitted on the 30th of March 1905. She is entitled to accounts from the defendants for only six years preceding this date.

I must now find on the issues: Issue No. 1. I allow the plaintiff to withdraw her claim to the moiety of the Worlee property claimed by Moledina's heirs with liberty to her to file a suit against them to establish her claim thereto if she desires to do so.

Issue No. 2. I find in the negative. The plaintiff will be at liberty any time during the continuance of this action to apply for an order to have accounts against the first defendant taken on the footing of wilful default if she is able to make out a sufficient case for that purpose.

Issue No 3. The second defendant is accountable only as the heir of her deceased husband Rahimtulla up to the death of Rahimtulla on the 13th of January 1903.

(1) (1883) 6 All. 1 at p. 9.

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With the exception of the moiety of the Worlee property there is no dispute as to the property of Cassam Sulleman to which the plaintiff is entitled and therefore it is not necessary to refer to the Commissioner to ascertain what that property is.

I pass a decree for the plaintiff declaring that she is absolutely entitled to the property both moveable and immoveable left by her grandfather Haji Cassam Sulleman.

Declare that the property of Haji Cassam Sulleman is the compensation paid for the house at Parell now in the hands of the Receiver in the suit—his share in the family house at Nagdevi Street and half share in the Worlee property. The decree will recite that I give the plaintiff leave to withdraw her claim to the other half of the Worlee property with liberty to file such suit as she may be advised against the heirs of Moledina who claim a moiety of the said property.

I direct the Receiver to hand over to the plaintiff the moneys in his hands in respect of the house at Parell after deducting therefrom his commission. This will be without prejudice to the plaintiff's right to apply to have the Receiver's commission paid by the first defendant if she establishes that the appointment of a Receiver was necessitated by his misconduct or any wrongful act or acts on his part. I refer the suit to the Commissioner to take an account of the management of the property and of the rents and profits thereof. The first defendant will account as an executor and the second defendant as the heir of the deceased executor. The accounts to be rendered must be from the 30th of March 1899. The second defendant will account only up to 13th January 1903 and the first defendant up to the time a Receiver was appointed in this suit.

I have carefully considered the question of costs. I think it would be fairest to all parties if at present I refrain from making any order as to the payment of costs. Myself or some other Judge before whom the case may come on after the accounts are taken will be in a much better position to judge of the contentions of the parties after the result of the taking of accounts is before the Court. By the time the accounts are taken the plaintiff will have had an opportunity of filing a suit in respect

of the moiety of Worlee property and the result of the suit if she files one will have a bearing on the question of a portion of the costs incurred at the hearing before me.

I reserve further directions and the question of all costs.

Note.—Mr. Bahadurji on behalf of the plaintiff undertakes not to charge, alienate or transfer her admitted share in the Worlee property so as to safeguard the defendants in case costs are ordered to be paid out of the estate.

Attorneys for the plaintiff :—*Messrs. Mehta & Dadachanji.*

Attorneys for the defendants :—*Messrs. Payne & Co. and Messrs. Captain & Vaidya.*

B. N. L.

APPELLATE CIVIL.

1908.
February 12

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

VITHU DHONDI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BABAJI BIN BAHIRU BHISE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 46, 47†—Conciliator's certificate obtained in the name of one co-parcener—Suit on behalf of the family—The remaining co-parceners joining as plaintiffs to the suit—Hindu Law—Manager—Powers to represent the family.

In a suit brought on behalf of a joint Hindu family the Conciliator's certificate required by section 46 of the Dekkhan Agriculturists' Relief Act

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* Second Appeal No. 281 of 1907.

† The sections run as follows :—

46. If the person against whom any application is made before a Conciliator cannot after reasonable search be found, or if he refuses or neglects, after a reasonable period has been allowed for his appearance, to appear before the Conciliator, or if he appears but the endeavour to induce the parties to agree to an amicable settlement or to submit the matter in question to arbitration fails, the Conciliator shall, on demand, give to the applicant, or when there are several applicants to each applicant a certificate under his hand to that effect.

47. No suit and no application for execution of a decree passed before the date on which this Act comes into force, to which any agriculturist residing within any local area for which a Conciliator has been appointed is a party, shall be entertained by any Civil Court, unless the plaintiff produces such certificate as aforesaid in reference thereto.

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VITHU DHONDI v. BABAJI.

(XVII of 1879) was obtained in the name of one of the co-parceners alone: but all the co-parceners joined as plaintiffs and admitted in the plaint that the certificate had been obtained on behalf of the joint family. It was objected to this suit that as the certificate was in the name of one of the plaintiffs the suit could not lie.

Held, overruling the objection, that the certificate obtained by one of the co-parceners, who was either the managing member of the family at the time the certificate was obtained or who though not manager obtained it with the consent and on behalf of the joint family, acting as its agent, was sufficient to support the suit.

The rule of Hindu law is that a joint family is represented in all transactions or concerns with the outside world by its *kartá* (manager), provided these are for the benefit or necessity of the family; and that any co-parcener who does not occupy that position of manager can represent and bind the family in such transactions or concerns, provided he was either previously authorized to represent it or, in the absence of such authority, the other co-parceners subsequently by words or conduct ratified his acts.

SECOND APPEAL from the decision of C. A. Kincaid, District Judge of Poona, confirming the decree passed by N. K. Bapat, Subordinate Judge of Sáswad.

This was one of the two suits brought against Vithu Dhondi and others for possession of certain lands. It was brought on behalf of the joint family of which Aba Bahiru was one of the co-parceners. The Conciliator's certificate required by section 46 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was taken out in the name of Aba Bahiru *alone*: but all the co-parceners of the family joined the suit as plaintiffs and admitted that the certificate was taken out by Aba on behalf of the family. The same was the case in the other suit. The two suits were heard together, the evidence having been recorded in one of them. The Subordinate Judge decreed the claims with costs.

On appeal before the District Judge the defendants' Pleader raised a preliminary objection that the suits were bad inasmuch as the Conciliator's certificate was in the name of the plaintiffs alone. This objection was overruled for the following reasons:—

"The first was an objection to the Conciliator's certificate which in both suits are in the name of one plaintiff only, *viz.*, Aba Bahiru, in Suit No. 14 of 1904 . . . . As the other plaintiffs had not produced Conciliator's certificate Mr. Vaidya contended that the Court had no jurisdiction so far as they were concerned. In both plaints, however, the plaintiffs have stated that the

certificates were taken out on behalf of the joint family. No evidence has been given to rebut this, and as the objection was not taken in the lower Court I overrule it."

The defendants appealed to the High Court.

Branson (with *R. W. Desai*) for the appellants:—The certificate in this case is obtained by only one of the plaintiffs. It does not purport to be on behalf of himself and others or for himself as manager of the family. It cannot, therefore, support a suit brought by the plaintiffs.

V. G. Ajinkya for the respondents:—The want of a certificate cannot vitiate the whole suit: the defect, if any, can be cured at any time by the remaining plaintiffs producing the certificate. Cites *Sayad Nyamtula* v. *Nana*[1] and *Krishnarav* v. *Hari*[2].

Further, the plaintiff in whose name the certificate is obtained is the manager of the joint family of the plaintiffs: this fact is mentioned in the plaint. The manager represents the joint Hindu family for all purposes: *Punamchand* v. *Chunilal*[3].

CHANDAVARKAR, J.:—The only point of law arising on this second appeal is whether the co-parceners of a joint Hindu family are entitled to maintain a suit, to which the provisions of section 47 of the Dekkhan Agriculturists' Relief Act apply, on the strength of a Conciliator's certificate obtained under section 46 of the Act by only one of those co-parceners, who was either the managing member of the family at the time the certificate was obtained, or, who, though not manager, obtained it with the consent and on behalf of the joint family, acting as its agent.

The rule of Hindu law is that a joint family is represented in all transactions or concerns with the outside world by its *kartá* (manager), provided they are for the benefit or necessity of the family; and that any co-parcener, who does not occupy that position of manager, can represent and bind the family in such transactions or concerns, provided he was either previously authorized to represent it, or, in the absence of such authority, the other co-parceners subsequently by words or conduct ratified his acts.

(1) (1888) 13 Bom. 424. (2) (1893) P. J. p. 397.
(3) (1907) 9 Bom. L. R. 336 (Journal).

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In the present case, though the Conciliator's certificate stands in the name of one of the plaintiffs only, all the plaintiffs joined in the suit and admitted in the plaint that the certificate had been obtained on behalf of the joint family. That averment was not traversed in the written statement, or made the subject of an issue in the Court of first instance. The certificate must be treated as having been obtained by the co-parcener in whose name it is not only for himself but also as agent of the other co-parceners. Whether such a certificate entitles all the co-parceners, who are not named in it, to join in a suit brought by the co-parcener who is named, is a question which must be determined upon the proper construction of the provisions in Chapter VI of the Dekkhan Agriculturists' Relief Act. A Conciliator exercises under the Act certain functions for the purpose of bringing about an amicable settlement of the dispute between two or more of the parties falling within the scope and object of the Act, and he has to exercise those functions subject to its provisions. One of them, *viz.*, section 41, provides that "whenever all the parties are present, the Conciliator shall call upon each in turn to explain his case." That means that a party to a dispute is entitled to appear before the Conciliator; and if he should appear it is the duty of the Conciliator to call upon him to explain his case. But what if a party wishes to appear before the Conciliator by an agent to explain his case and to act for him otherwise in the matter of the conciliation? Is such agent entitled to appear and obtain a certificate for his principal or principals? The Dekkhan Agriculturists' Relief Act being silent upon that point, the case falls within the rule of construction stated as follows by Stirling, J., in *Jackson & Co.* v. *Napper. In re Schmidt's Trade-Mark*[1] :—

"I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. Of course, the legislature may do

[1] (1886) 35 Ch. D. 162 at p. 172.

so, but, *primâ facie*, when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose."

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The legislature, which must be taken to have been aware of the rule of Hindu law above stated when it passed the Dekkhan Agriculturists' Relief Act, has not by any of the provisions expressly or impliedly dispensed with that rule. The certificate, obtained by one of the plaintiffs on behalf of the rest, enures, therefore, for the benefit of all.

For these reasons we must overrule the point urged in support of this second appeal and confirm the decree with costs.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

HAZARIMAL FAKIRCHAND, APPLICANT, *v.* NAMDEV RAKHMAJI AND ANOTHER, OPPONENTS.*

1908. *February* 20.

Civil Procedure Code (Act XIV of 1882), section 294—Execution of decree—Decree holder bidding for property with permission—Right to set off amount due to decree holder against purchase money.

The first paragraph of section 294 of the Civil Procedure Code (Act XIV of 1882) requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, *if he so desires*, be set off. *But it* may be one of the terms on which the permission to bid is granted that there should not be this right of set off. In such a case no set off can be directed.

CIVIL REFERENCE by E. Reuben, Subordinate Judge of Haveli in the Poona District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

One Hazarimal Fakirchand was the assignee of a decree passed by the Court of the Subordinate Judge at Haveli against Nam-

* *Civil Reference No. 6 of 1907.*

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HAZARIMAL v. NAMDEV.

dev Rakhmaji and Tukaram Rakhmaji. In execution of the said decree certain immoveable property having been advertised for sale, the decree holder Hazarimal applied to the Collector, to whom the decree was transferred for execution, and obtained from him permission to bid and purchase under the first paragraph of section 294 of the Civil Procedure Code (Act XIV of 1882). But the Collector having no power under the second paragraph of the section to allow purchase money to be set off against the decretal amount, Hazarimal applied to the Court which passed the decree for such permission. The Subordinate Judge, thereupon, submitted the following question under section 617 of the Civil Procedure Code:—

Whether in the case of decrees transferred to the Collector for execution the Court has power to allow a set off between the purchase money and the decretal amount under section 294 paragraph 2 of the Civil Procedure Code?

The opinion of the Subordinate Judge was in the affirmative for the following reasons:—

While the power to allow a set off is not conferred on the Collector, the decree holder is required by Rule 16 (1) (c)—given on page 52 of the High Court Circular Book—to agree that the "purchase money shall be paid to the Collector."

This is interpreted as implying that in such cases the purchase money must always be paid down in cash without setting it off against the decretal amount.

* * * * * * *

My order on the present application would not come under section 588, Civil Procedure Code, and would accordingly be non-appealable.

* * * * * * *

My opinion is that the Civil Court's power to allow a set off is not taken away by the fact that the decree is sent to the Collector for execution.

According to section 320, Civil Procedure Code (vide last paragraph but one), it is only such powers as are conferred on the Collector that are not exercisable by the Court. And the power to allow set off being distinct from the power to grant permission to a decree holder to bid and purchase and not being conferred on the Collector is still exercisable by the Court.

N. M. Patvardhan (amicus curiæ) for the applicant.

P. D. Bhide (amicus curiæ) for the opponents.

JENKINS, C. J.:—No reference in this case lies, because no order can be made under the second paragraph of section 294 of the Code of Civil Procedure. That section is perfectly clear. The first paragraph of that section requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which permission to bid is granted that there should not be this right of set off. That seems to be the case here. It is clear then that the Subordinate Judge has no power to direct a set off.

We are obliged to the pleaders who have assisted us with their arguments in this case.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

GANGARAM KEVAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. NAGINDAS KHUSHALDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

1908. *February 24.*

Civil Procedure Code (Act XIV of 1882), section 11—Suit of a civil nature—Administration suit—Estate belonging to a living Hindu debtor—Competency to entertain the suit.

A Civil Court cannot entertain a suit brought to administer the estate belonging to a living Hindu debtor.

Bai Meherbai v. *Maganchand*(1), explained.

APPEAL from an order passed by Dayaram Gidumal, District Judge of Surat, reversing the decree passed by and remanding the case to Jehangirji E. Modi, First Class Subordinate Judge at Surat.

Administration suit.

* Appeal No. 7 of 1907 from order.
(1) (1904) 29 Bom. 96: 6 Bom. L. R. 853

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The property sought to be administered belonged to a joint Hindu family consisting of one Dhanji and his two sons Mulchand and Tribhovan (defendant No. 1).

The business transactions of Dhanji with the plaintiff resulted in the former agreeing to pay to the latter a sum of Rs. 4,744. After Dhanji's death, his eldest son Mulchand as manager of the family passed acknowledgments from time to time, the last one of which was in October 1903. Mulchand died in 1904. The family estate then passed into the hands of Tribhovan (defendant No. 1).

On the 15th August 1905, the plaintiff commenced an action to administer the estate in the hands of Tribhovan. There were also other creditors of Tribhovan, who had obtained decrees against him. They were made defendants (Nos. 2—8) to this suit. The plaintiff alleged in his plaint that the family estate of defendant No. 1 was worth Rs. 3,500, whereas the debts amounted to over Rs. 11,000.

One of the issues raised by the Subordinate Judge at the trial was: "Is this sort of suit maintainable." This issue he found in the negative and dismissed the plaintiff's suit. His reasons were as follows:—

"We know of suits for the administration of the estates of lunatics and minors: and also the administration of the estate of a deceased debtor. For the form of a plaint in a suit by a creditor for the administration of the estate of his deceased debtor see Form No. 105 in Schedule II to the Civil Procedure Code. But in the present suit there is no administration claimed of the estate of a deceased person. . . . For the sake of argument we shall grant at once that the first defendant is personally liable for the plaintiff's debt. But in that case the suit should be against the first defendant for the amount of the debt itself. There is no precedent that I know of for the administration of the estate of a living debtor except as stated above in the case of insolvency, lunacy or infancy or after a receiver is appointed."

The plaintiff appealed. In appeal the District Judge held that the suit as framed was maintainable in a Civil Court. He therefore reversed the decree passed by the Subordinate Judge and remanded the case to him for trial on merits. His reasons were as follows:—

"The plaintiff's pleader relies strongly on sections 11 and 213 of the Code of Civil Procedure, and on the remarks of Mr. Justice Chandavarkar in 6 Bom.

L. R. 853 at p. 856. In the case before his Lordship, the defendant (one of the creditors) had obtained a decree against the administrator of a Parsi's estate and in satisfaction of the decree obtained a sale-deed with the sanction of the Court under section 257A, Civil Procedure Code. The management of the estate then passed into the hands of another administratrix, who brought a suit to set aside the decree of sale. But both were held binding under sections 244 and 13, Civil Procedure Code, as there had been no fraud or collusion though section 282 of the Succession Act (which applied to the estate) laid down that 'no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal or on any other account,' and that 'the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.' Mr. Justice Chandavarkar said at the end of his judgment: 'This result is no doubt to be regretted, because it virtually gives preference to one creditor as against other creditors of the deceased's estate, whereas the rule of law is that they shall all share rateably. But the result is due to the fact that that rule of law has to give way in this case to another rule, *i. e.*, that of *res judicata* which could have been avoided had the Court, which passed the decree in the suit brought on an arbitrator's award by the respondent's father as a creditor of the deceased, treated it, as it should have, as an administration suit and passed its decree accordingly. We think that, we must take this opportunity of impressing upon the mofussil Courts the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis Where the plaintiff is not willing to amend, the Court, if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration and not otherwise. It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of those creditors.'

The plaintiff's pleader says he has framed his suit in accordance with these remarks and is prepared to make all verbal amendments so as to make it practically an administration suit on behalf of all the creditors of the estate, while the defendant's pleaders say that the remarks apply only to the estate of deceased Parsis governed by section 282 of Act X of 1865. No law, however, is quoted barring the cognizance of a suit like this under section 11 of the Civil Procedure Code."

The defendants appealed to the High Court.

Ratanlal Ranchhoddas, for the appellants:—This is an administration suit as to the estate belonging to a living Hindu debtor. Such a suit cannot lie. Even under the English law, such a suit would not lie. An administration suit postulates the existence

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of the estate belonging to a deceased person. Although there is no express authority saying that an administration suit cannot lie as to the property of a living debtor, but wherever the expression "administration suit" is used it is associated with the estate of a deceased person. See Ashburner's Equity, p. 570: the Judicature Act, 1873, section 34 (3), at p. 496 of Vol. II of the Annual Practice for 1908; and Order XVI, rules 40 and 47 at pages 189 and 195 of Vol. I of the Annual Practice for 1908. And the word "administration" is defined in the Encyclopœdia of American and English Law (Vol. I, p. 643), as "the management of the estate of a deceased person who has left no executor." In administration suit in India, the English practice is followed: see *Soobul Chunder Law* v. *Russick Lall Mitter*[1] and *Dhunraj* v. *Broughton*[2].

But in cases where Hindu law applies such an action cannot be maintained. Under it, where property passes by survivorship in a joint Hindu family, there is nothing like an estate belonging to the deceased: see Mitakshara, c. 1, s. 1, pp. 21—24, 27; Vyavahara Mayukha, c. 4, s. 1, p. 3.

N. K. Mehta for the respondent relied on section 11 of the Civil Procedure Code, 1882.

CHANDAVARKAR, J.:—This was a suit brought by the respondent to administer the estate of his debtor Tribhovan. Tribhovan was made a party defendant with his other creditors, and the plaintiff prayed that as the estate of the first defendant was valued at only Rs. 3,500 whereas the debts amounted to Rs. 11,000, it was necessary that the estate should be administered by the Court and that the assets should be realized and rateably distributed amongst the creditors. The Subordinate Judge raising the issue whether such a suit was maintainable decided it in the negative. The District Judge on appeal, has, however, come to a different conclusion relying on certain observations in the decision of this Court in *Bai Meherbai* v. *Maganchand*[3]. But those observations apply to the estate of a

(1) (1888) 15 Cal. 202 at pp. 208, 209.
(2) (1873) 13 Beng. L. R. 298 at pp. 299, 300.
(3) (1904) 29 Bom. 96 at p. 101.

deceased person, and, moreover, it must be remembered that they applied to the estate of a deceased Parsi. Therefore, the decision cannot be treated as an authority on the question whether an administration suit in the case of the estate of a Hindu, living or dead, can be maintained or not. The District Judge has further relied upon section 11 of the Civil Procedure Code. No doubt, according to that section a Court has jurisdiction to try every suit of a civil nature, but treating this, as it no doubt is, as a suit of a civil nature, the question is whether the plaintiff has a right to a decree entitling him to have the property of a living person distributed against the wishes of his other creditors. If these are not willing, the plaintiff is not entitled to force his wishes upon them. These considerations do not apply to the estate of a deceased person.

Under these circumstances we think that such a suit cannot lie. We reverse the decree of the District Judge and restore that of the Subordinate Judge with costs in this Court and the District Court upon the respondent.

HEATON, J.:—I should like to add another reason to that given by my learned colleague. This suit is to obtain the administration by the Court of the property of defendant No. 1; that is to say, in effect, it is a suit to take the administration of his property out of the hands of the owner and to have that property administered, without regard to the owner's necessities or wishes. Stated in that form, it seems to me that very strong argument is needed to show that such a suit could lie, except under a special law such as that relating to insolvency; and nothing to my mind convincing has been put forward.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.
February 27

JANARDAN VISHNU KULKARNI (ORIGINAL DEFENDANT 1), APPELLANT, *v.* ANANT LAKSHMANSHET AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 4), RESPONDENTS, AND, RAVJI MANGESH KULKARNI (ORIGINAL DEFENDANT 4), APPELLANT, *v.* ANANT LAKSHMANSHET AND ANOTHER (ORIGINAL PLAINTIFFS 1 AND 2), RESPONDENTS.*

Documents executed in the mofussil—Contracts of the people of India—Liberal construction—Regard to be had to all the circumstances of a transaction—Intention to make land security for payment of debt—Charge—Transfer of Property Act (IV of 1882), section 100.

Documents executed in the mofussil come within the statement of the Privy Council in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1) that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses."

Where having regard to all the circumstances of a transaction there remains no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the debt mentioned therein, the documents create a charge.

SECOND APPEALS from the decision of A. L. Emanuel, Assistant Judge of Ratnágiri, confirming the decree of S. S. Wagle, Subordinate Judge of Málvan.

This was a suit for redemption and the facts necessary for the purpose of this report were as follows:—

The property in dispute originally belonged to three brothers, Tuke, Ram and Lakshman Bable Parab. They mortgaged it with possession to the family of defendants 1, 2 and 3 for Rs. 75 of the Chándwad Currency, equivalent to Rs. 72 of the British Currency. The mortgage was dated Shake 1766 (1844-45 A. D.). Tuke having died childless, his share in the property devolved on his two surviving brothers Ram and Lakshman. Subsequently Bapu, son and heir of Lakshman, mortgaged the said property

* Joint second Appeals Nos. 162 and 255 of 1905.

(1) (1856) 6 Moo. I. A. 411.

along with some other property to the plaintiffs on the 2nd April 1875 stipulating that they should redeem the mortgage of defendants 1—3. Hence the present suit. Defendant 4 was the purchaser at Court-sale of the rights of the heirs of Lakshman who were joined as defendants 6 and 7 and defendant 5 was the heir of Ram.

Defendants 1 and 2 answered, *inter alia*, that in addition to the amount of Rs. 75 secured by the mortgage they were entitled to recover the amount of four money bonds, three of which were registered. Two out of the four bonds were executed by Tuke Bable, the third by Lakshman Bable and the fourth by Bapu Bable, and the executants of the bonds had bound themselves to pay the amounts before the redemption of the mortgage. The defendants further contended that if the plaintiffs had a right to redeem, they could exercise that right with respect to a half share of that property.*

Defendant 4 set up his right as auction-purchaser in addition to the above.

The other defendants were absent.

The Subordinate Judge found that the plaintiffs were entitled to redeem only a moiety of the mortgage as they were mortgagees under Bapu alone. He, therefore, passed a decree for redemption

* The particulars of the four money bonds referred to by defendants 1 and 2 in their written statement were as follows:—

Exhibit 41.—Registered money bond passed by Lakshman Bable for Rs. 72. It recited—Our *thikans* are mortgaged to you. Before the redemption of the *thikans* by payment of the mortgage debt, I shall at first pay you in full this amount and then redeem the *thikans*. No default will be made herein.

Exhibit 42.—Simple money bond passed by Bapu Bable for Rs. 99. It recited—Our *thikans* are mortgaged to you. At the time of redemption, I shall pay you in full this amount, including interest. Before I pay you this amount I shall not seek redemption.

Exhibit 44.—Registered money bond passed by Tuke Bable for Rs 15½. It recited—Our *thikans* are mortgaged to you. At the time of the redemption of the *thikans*, I shall at first pay you this amount and then redeem the *thikans*.

Exhibit 45.—Registered bond passed by Tuke Bable for a certain quantity of paddy borrowed. It recited—Our two *thikans* are mortgaged to you. At the time of the redemption of the two *thikans*, I shall at first pay off the paddy and then redeem the two *thikans* on payment of the mortgage debt.

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JANARDAN v. ANANT.

directing the plaintiffs to pay to defendants 1 and 2 Rs. 36 within six months from the date of the decree, and the defendants to put the plaintiffs in joint possession along with themselves of a moiety of the mortgaged property. The contention of the defendants that they were entitled to be paid the amount of the four money bonds before redemption was disallowed on the following grounds :—

In addition to the amount of Rs. 75 secured by Exhibit 43 the defendants 1 and 2 claim the amounts of four bonds, Exhibits 44, 45, 41 and 42. The first two are executed by Tuke Bable, the third by Lakshman Bable and the last by Bapu Lakshman. They are all simple bonds, but the executants bind themselves to pay the amounts before redemption of Exhibit 43. Such bonds do not create a charge on the mortgaged property : *Hari Mahadaji* v. *Balambhat*[1], *Rama* v. *Martand*[2], *Yashvant* v. *Vithoba Sheti*[3]. The condition contained in such bonds is binding on the conscience of the mortgagor. *Allu Khan* v. *Roshan Khan*[4], *Krishnaji* v. *Maheshvar*[5]. But it is not binding on the subsequent assignee of the mortgagor. *Hari* v. *Balambhat*[6], *Unni* v. *Nagammal*[7], *Ramchandra* v. *Dhondi*[8]. I am of opinion, therefore, that plaintiffs are not bound to pay the amounts of Exhibits 44, 45, 41 and 42. They are only liable to pay half the amount of Exhibit 13, *viz*, Rs. 36. Exhibit 43 does not bear interest.

On appeal by defendant 1 the Assistant Judge confirmed the decree.

Defendants 1 and 4 preferred second Appeals Nos. 182 and 225 of 1905, respectively.

SECOND APPEAL No. 182 OF 1905.

Ráo Bahádur G. N. Nadkarni for the appellant (original defendant 1)—The four money bonds do create a charge on the property. In construing such documents the intention of the parties must be considered. The language of the bonds makes the intention quite clear : section 100 of the Transfer of Property Act. Further the fact that the bonds were registered confirms the intention. The rulings in *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare*[9] and *Subrao Mangeshaya* v. *Manjapa Shetti*[10] against clogging the equity of redemption are

(1) (1884) 9 Bom. 233.
(2) (1884) 9 Bom. 236 Note.
(3) (1887) 12 Bom. 231.
(4) (1881) 4 All. 85.
(5) (1895) P. J. p. 112.
(6) (1884) 9 Bom. 233
(7) (1895) 18 Mad. 368 at p. 372.
(8) (1893) P. J. p. 165.
(9) (1884) 9 Bom. 233.
(10) (1892) 16 Bom. 705.

not approved in the later ruling in *Rajmal* v. *Shivaji*[1]. Further in the present case the question as to a clog does not arise. We therefore submit that we are entitled to recover the amounts of the four bonds before redemption is allowed.

K. N. Koyaji for the respondents (original plaintiffs):—The money bonds, which were passed subsequent to the mortgage sued upon, provide for payment before redemption. They therefore distinctly clog the equity of redemption and cannot be enforced: *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare*[2], *Subrao Mangeshaya* v. *Manjapa Shetti*[3].

SECOND APPEAL NO. 255 OF 1905.

G. S. Mulgaonkar for the appellant (original defendant 4).

K. N. Koyaji for the respondent (original plaintiff 1).

JENKINS, C. J.:—The only question that arises on this appeal (No. 182 of 1905) is whether the appellant is entitled to priority of payment in respect of the amount due on four instruments being Exhibits 45, 41, 41 and 42 Of these Exhibits 45 and 41 were executed in 1817, 41 in 1818, and 42 in 1868; and the appellant claims the benefit of them. He also claims the benefit of the mortgage created by an instrument, Exhibit 43.

The lower appellate Court has decided against the appellant relying on *Rajmal* v. *Shivaji*[1]. But that case really is not applicable as the decision cited by the learned Assistant Judge turned altogether on the fact that it was conceded and had to be conceded in the absence of registration that the document there under consideration did not create a charge.

It seems to us therefore that we are in no way concerned with the doctrine which forbids anything that would amount to a clog on the equity of redemption.

All we have to consider is whether by these four documents charges were created.

Now we start with this that these documents were executed in the mofussil and come within the statement of the Privy

(1) (1902) 27 Bom. 151. (2) (1884) 9 Bom. 233.
(3) (1892) 16 Bom. 705.

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Council in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1], where it was said that "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Exhibits 45, 44 and 41 are registered, and Exhibit 42, the only unregistered document, is security for an amount less than that in respect of which registration is required under the Registration Act. This is not without its significance.

From section 100 of the Transfer of Property Act we learn what a charge is: for, it is there provided "Where immoveable property of one person is by act of parties made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." The form of words used is immaterial, all we have to be satisfied of is that the documents show an intention that the person in whose favour they were executed should have the benefit of the security of the land.

Approaching these documents in the spirit of what is laid down by the Privy Council, and having regard to all the circumstances of the transaction we feel no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the money mentioned therein, and from that it follows that the documents do create the charge: and we therefore think that the appellant is right in his contention. The plaintiff is entitled to redeem on payment of the amount that will be found due on the basis of our decision.

The final decree will be passed after the pleaders have settled the amount between themselves.

The appellant will have his costs of this appeal.

Appeal No. 255 of 1905 is dismissed with costs.

The appellant to get all his costs, charges and expenses as mortgagee.

G. B. R.

(1) (1856) 6 Moo. I. A. 391 at p. 411.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

BAI DIWALI (ORIGINAL DEFENDANT), APPELLANT, *v* PATEL GIRDHAR GOVINDRAM (ORIGINAL PLAINTIFF), RESPONDENT *

1908.
February 28.

Civil Procedure Code (Act XIV of 1882), section 13—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 20(1)—Suit on a promissory note—Issue as to payment by instalments—Finding in the negative—Extension of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for instalments—Res Judicata

In a suit instituted in the Court of the First Class Subordinate Judge of Ahmedabad on a promissory note an issue was raised as to whether the amount sued for should be made payable by instalments and the finding was in the negative. The suit was decreed on the 21st July 1905 The Dekkhan Agriculturists' Relief Act (XVII of 1879) was extended to the Ahmedabad District on the 15th August 1905. Thereupon the defendant having applied for payment by instalments the application was dismissed on the ground that the question of instalments was *res judicata.*

Held that section 13 of the Civil Procedure Code (Act XIV of 1882) was not applicable. Section 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) contemplates that even when a decree has been passed which does not allow of instalments, the Court should have power to allow instalments in execution.

SECOND APPEAL from the decision of A. C. Wild, Acting District Judge of Ahmedabad, confirming the order of Chimanlal Lallubhai, First Class Subordinate Judge, in an execution proceeding.

The plaintiff brought a suit in the Court of the First Class Subordinate Judge of Ahmedabad against Bai Divali, widow of Nahnabhai Mulji, to recover the amount of a promissory note passed by the defendant's deceased husband. At the trial an issue

* Second Appeal No. 685 of 1907.

(1) Section 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) :—

20. Power to fix instalments in execution.

The Court may at any time direct the amount of any decree passed, whether before or after this Act comes into force, against an agriculturist, or the portion of the same which it directs under section 19 to be paid, shall be paid by instalments with or without interest.

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was raised as to whether the amount should be made payable by instalments and the finding of the Court was in the negative. On the 21st July 1905 the Court passed a decree allowing the claim and directing that the decretal amount should be realized from the assets of the deceased. Subsequently the Dekkhan Agriculturists' Relief Act was extended to the Ahmedabad District on the 15th August 1905. The defendant thereupon applied for the payment of the amount by instalments. The Subordinate Judge rejected the application as time-barred under article 175, Schedule II of the Limitation Act (XV of 1877).

On appeal by the defendant the District Judge found that the application was not time-barred inasmuch as under section 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) "an application for instalments may be made at any time without any period of limitation," but he confirmed the order on the ground of *res judicata* for the following reason:—

It was however decided in the suit out of which the present matter arises that the judgment-debtor was not to get instalments, and as this was reduced to the form of an issue which was decided against the judgment-debtor, the question of instalments would appear to be "*res judicata*."

The defendant preferred a second appeal.

T. R. Desai for the appellant (defendant):—The only point is whether an application for instalments once made and rejected in the progress of the suit debars a subsequent application for the same relief in the execution proceedings. The District Judge erroneously held that the bar of *res judicata* arises in a case like the present. The language of section 20 of the Dekkhan Agriculturists' Relief Act is quite clear. It leaves a wide latitude to Courts to allow instalments at any stage of the case. Courts should have regard to the spirit of the section and the object of the legislature in construing a special enactment like the Dekkhan Agriculturists' Relief Act. If the legislature meant the contrary, there would have been an express provision made to that effect.

L. A. Shah for the respondent (plaintiff):—What the Court has to see is whether the case falls under section 13 of the Civil Procedure Code. The relief as to instalments was the subject

of an express issue in the suit and was adjudicated upon and decided against the defendant. Though the Dekkhan Agriculturists' Relief Act was extended to the Ahmedabad District in August 1905, still section 20 of the Act was made applicable to that district in 1903. Therefore when the suit was decided in July 1905 the Court had the power, if it chose, to grant instalments under the section. But it refused to do so and hence the bar of *res judicata.*

JENKINS, C. J.—The decision of the District Court proceeds on the assumption that the doctrine of *res judicata* has some application to the case. But that is not so.

Section 13 of the Civil Procedure Code from its very terms cannot apply, and though that section is not exhaustive, the rule on which it is founded can have no application here, because section 20 of the Dekkhan Agriculturists' Relief Act contemplates that even when a decree has been passed which does not allow of instalments, the Court shall have power to allow instalments in execution.

The order must be set aside and the case must go back for disposal by the learned Judge who must consider whether apart from the ground on which he has proceeded, the instalment should or should not be granted.

Costs of this appeal will abide the result.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1908.
March 26.

BHURABHAI JAMNADAS AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BAI RUXMANI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), section 10—Trust for a specific purpose, meaning of the expression—Express trust—English law—Palla money deposited with the bride's father—Misappropriation of the sum—Suit to recover the money —Limitation.

The plaintiffs were husband and wife. A sum of Rs. 366, being the amount of the female plaintiff's *palla* or dowry, was, on the occasion of her betrothal to the male plaintiff in 1871, made over by the male plaintiff's father to the keeping of the lady's father as a fund constituting her *palla* in accordance with the usual practice prevailing in the caste. This fund having been misappropriated either by the original trustee or after his death by his legal representatives, this suit was brought to recover the sum. The defendants contended that the suit was barred by limitation :—

Held, that section 10 of the Limitation Act (XV of 1877) applied to the case; and that it was, therefore, not barred.

Section 10 of the Limitation Act (XV of 1877) requires, as conditions precedent to its applicability, first, that the suit should be against a person in whom property has become vested in trust for a specific purpose or against his legal representatives or assigns, and, secondly, that the suit should be for the purpose of following such property in his or their hands.

The phrase "trust for a specific purpose" in section 10 of the Act is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" in English law. It is used in the section in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive.

The meaning of the expression "following the property" discussed and explained.

SECOND APPEAL from the decision of G. D. Madgaonkar, District Judge of Broach, reversing the decree passed by P. J. Talyarkhan, Subordinate Judge at Ankleshvar.

Suit to recover a sum of money.

The plaintiffs Bhurabhai and Bai Ujam were husband and wife. On the occasion of their betrothal in 1871, a sum of Rs. 366 was

* Second Appeal No. 652 of 1907.

deposited with Bai Ujam's father Jagjivan as Bai Ujam's *palla* or dowry. Jagjivan died in 1877. His son Krishnavallabh succeeded to the estate; but he died in 1880. On his death the estate passed to his widow, Bai Ruxmani (defendant).

The plaintiffs filed a suit to recover Rs. 366 from the defendant in 1905.

The defendant contended *inter alia* that the suit was barred by time.

The Subordinate Judge held that the claim was covered by section 10 of the Limitation Act (XV of 1877), and was outside the statute of limitations. He, therefore, decreed the claim.

On appeal, the District Judge came to a different conclusion. He held that the section 10 did not apply to the case, and that it was time-barred, for the following reasons:—

The main question in the case is one of limitation. For the plaintiffs, it is contended that section 10 of the Limitation Act applies and the suit cannot be barred; for the defendant, that there was no trust for any specific purpose of the amount to bring the suit within the purview of this section and that the suit is barred under Article 115 or 120 of the second schedule, if not under Articles 98 and 60.

The considerations and authorities in the plaintiff's favour are fully expounded in the judgment of the lower Court, and they need not be recapitulated here. I am unable to accept the defendant's contention that there was no trust. A deposit of itself does not amount to a trust. *Secretary of State for India* v. *Fazal Ali*, I. L. R. 18 Cal 235, nor can relationship of itself lead to a conclusion of fiduciary relations *Mahomed* v. *Amtal*, I. L. R. 16 Cal. 161. But where as here the two are combined and the amount deposited is *palla* or dowry, deposited on behalf of the husband with the father of the girl, all these elements, especially when considered in the light of the spirit and character of the Hindu '*stridhan*' and the nature of Hindu marriage and social customs, amply suffice to raise the deposit from the nature of an ordinary loan into that of a trust *Dorabji* v. *Muncherji*, I. L. R. 19 Bom. 352, 775; *Cursandas* v. *Chaturbhuj*, 5 Bom. L. R. 511, 513.

On the other hand I find myself unable to accede to the plaintiff's contention that the deceased father of plaintiff No. 2 was an express trustee or that the trust was for any 'specific' purpose or that the present suit is 'to follow' such property. To say, as the plaintiffs do, that the specific purpose was the benefit of the girl, is merely to repeat in other words the fact that the girl was the beneficiary, a fact already contained in the conclusion above that there was an implied trust in the deposit, and indeed common to all trusts. A trust is *ipso facto* for the benefit of the beneficiary *vide* section 3 of the Indian Trusts Act.

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But a 'specific' trust, within the meaning of section 10 of the Limitation Act, must be something more; else the word 'specific' loses all its meaning. When, moreover, according to the plaintiff's own evidence, the trustee in this particular case of *palla* had unfettered discretion as to whether he should turn the amount into ornaments or keep it in cash, or in the latter case whether he should lay it out at interest at all or not; and his sole responsibility is limited to returning the bare amounts when called upon, or the ornaments made, if any; it seems truly impossible to hold that plaintiff No 2's deceased father was, in this case, a person in whom property had become vested in trust for any specific purpose or that the present suit is to follow such property. Upon the view taken of the law by the lower Court, the heirs of the deceased father of plaintiff No. 2 no less than the estate would be, at whatever distance of time, legally liable to the heirs of plaintiff No. 2 for the *palla* amount. Such a result can scarcely have been contemplated by the legislature; and affords a negative test that the views taken below can hardly be correct and that the words 'specific' in section 10 must be strictly construed, as in *Dorabji* v. *Muncherji*, I. L. R. 19 Bom. 352 referred to above. I must hold that there is no specific purpose and that section 10 does not apply.

The plaintiff appealed to the High Court.

At the hearing, the respondent's pleader raised a preliminary objection that no second appeal lay in the case, as the amount in dispute was less than Rs. 400, and the suit was of a Small Cause Court nature.

G. K. Parekh, for the respondent, in support of the preliminary objection.

L. A. Shah, for the appellants:—The present suit relates to trust and as such is exempted from the jurisdiction of Small Cause Courts: see Article 18, Schedule II, Act IX of 1887. The Courts below have held the trust established.

The Court overruled the preliminary objection.

L. A. Shah, for the appellants:—We say that section 10 of the Limitation Act (XV of 1877) applies to this case. The phrase "trust for a specific purpose" in the section is synonymous with "express trust" under English law. See *Vandravandas* v. *Cursondas*[1] *Mathuradas* v. *Vandrawandas*[2], *Narrondas* v. *Narrondas*[3], *Soar* v. *Ashwell*[4], and *Sethu* v. *Krishna*[5].

(1) (1897) 21 Bom. 610.

(2) (1903) 21 Bom. 222: 5 Bom. L. R. 328.

(3) (1907) 31 Bom. 415: 9 Bom. L. R. 457.

(4) [1893] 2 Q. B. 390.

(5) (1890) 14 Mad. 61.

Further, the provisions of section 10 are applicable to the case, since the suit is brought to follow the trust property. When the trust property is money, the suit cannot be to recover the identical property but to recover the amount from the estate of the trustee. Even if the trustee has misappropriated the trust money he should be treated as being a trustee for the amount. Refers to *Balwant Rao* v. *Purun Mal Chaube* (1), *Thackersey Dewraj* v. *Hurbhum Nursey*(2), *Sethu* v. *Subramanya*(3).

G. K. Parekh for the respondent:—We contend in the first place that there is no trust at all; it is only a deposit. See *Jamnadas* v. *Pragjee*(4) and *Dorabji Jehangir Randiva* v. *Muncherji Bomanji Panthaki*(5). If it is a deposit, the suit is barred under Article 60 of the Limitation Act (XV of 1877). If this is treated as a trust, then too the suit is barred under Article 98 of the Act.

Section 10 of the Limitation Act (XV of 1877) does not apply to the case, as it is not a suit to follow the trust property. After Jamnadas' death in 1873 there was no trust at all.

The subject matter of the suit is money; and it would be straining the language of the section to say that the suit is to follow trust property within the meaning of the section.

L. A. Shah was heard in reply.

BATCHELOR, J.:—A preliminary objection was raised by the Honourable Mr. Gokaldas that under the Provincial Small Cause Courts Act no second appeal lay, but it appears to me clear that this is a "suit relating to a trust" within the meaning of Article 18 of Schedule II of the Act, so that a second appeal is competent.

The only other question debated is whether, as the first Court held, the suit falls under section 10 of the Limitation Act and so is within time, or whether, as the lower appeal Court has decided, the suit does not fall under this section, in which case it would admittedly be barred by time.

(1) (1883) L. R. 10 I. A. 90.
(2) (1884) 8 Bom. 432.
(3) (1887) 11 Mad. 274.
(4) (1903) 5 Bom. L. R. 778.
(5) (1891) 19 Bom. 352.

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Section 10 of the Limitation Act requires, as conditions precedent to its applicability, first, that the suit should be against a person in whom property has become vested in trust for a specific purpose or against his legal representatives or assigns, and, secondly, that the suit should be for the purpose of following such property in his or their hands. The question is whether the present suit answers both these requirements. That will primarily depend upon the facts of the case, and upon the findings of the lower appeal Court, which we must accept in second appeal. I take it that the main facts found are that a sum of Rs. 366, being the amount of the female plaintiff's *palla* or dowry, was, on the occasion of her betrothal to the male plaintiff, made over by the male plaintiff's father to the keeping of the lady's father, Jagjivan, as a fund constituting her *palla* in accordance with the usual practice prevailing in the caste; and that this fund has been misappropriated either by the original trustee or after his death by his successive legal representatives, his deceased son, or that son's widow, the present defendant.

In thus putting the facts on the footing of a misappropriation I am taking the case least favourable to the appellant, and I do so because the precise conclusion of fact at which the lower appeal Court arrived on this point is not clear to me. It may be that the Court intended to find that the trust fund still remains mingled with the estate of Jagjivandas which has descended to the defendant. On the other hand there are some passages in the judgment which suggest to my mind that the finding intended was that the trust fund had been misappropriated and squandered, and as this latter hypothesis is the less favourable to the decision which I have reached, I adopt it for the purposes of this judgment, though I hope to show that the result is unaffected whichever finding of fact may have been intended by the Court below.

This then being the state of facts, the first question which arises is whether there was a trust of the fund for a specific purpose. That there was a trust, and not a mere deposit, is a proposition which both Courts have accepted and which seems to me abundantly clear. Jagjivandas was to hold the money,

which amounted to the precise sum fixed by the caste for a girl's dowry, as the dowry of the female plaintiff and for her benefit. The beneficial interest passed to her from the male plaintiff's father. She was then only about four years old, and the understanding was that her father was to hold the money on her behalf, or to convert it into ornaments and hold them on her behalf, until she came to have a house of her own and demanded the fund or its proceeds. The male plaintiff's father's interest in the money ceased, and after the transfer he would not have been entitled to demand the repayment of the money to himself. It is plain that Jagjivandas took as trustee for the female plaintiff.

And it seems to me equally plain that he took on a "trust for a specific purpose." In *Vundravandas* v. *Cursondas*[1] it was held by a Division Bench of this Court that this phrase was merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" of English law. I think that we should follow this opinion, and I do not doubt that the expression "trust for a specific purpose" was used, like "express trust," in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive; but the point is not of much present consequence for, as it seems to me, Jagjivandas's liability is established under either form of the definition. For there is no question here of a constructive or resulting trust, but of a direct trust, created by the author, who himself constituted Jagjivandas the trustee. And in my opinion it was also a trust for a specific purpose, namely for the provision of the customary dowry for the betrothed girl. It is no answer to say that there is no evidence proving the precise words used when the fund was made over to the girl's father and guardian. At this distance of time such evidence is not to be expected, nor is it necessary where, as here, there is other evidence to shew that these were the terms upon which the money was given to Jagjivandas. The material point is that this fact should be established, as it is held to be in this case; it matters nothing whether it is established by the proved use of a

(1) (1897) 21 Bom. 646.

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certain form of words or by the acts, the conduct, and the relation of the parties, and by the circumstances surrounding the transfer: in either case it is an express trust. I think therefore that the first requirement of section 10 of the Limitation Act is fulfilled.

It remains to consider the second requirement, namely, that the suit should be for the purpose of following the trust property into the hands of the trustee or his legal representative. If this condition be also complied with, it will not assist the defendant that the trustee Jagjiwandas died in 1877, for admittedly she is now his legal representative and would therefore be liable to the extent of his estate descended to her. Is, then, the present suit a suit for following the property in the hands of the trustee's legal representative? It may be said that a money fund which has been simply dissipated cannot be followed, and, so far as I am aware, the English cases go no further than this that the trust property may be followed into any other form in which after conversion it may be traceable. But I venture to doubt whether the English decisions are of much direct assistance in interpreting section 10 of the Indian Limitation Act; for in England there is the broad rule that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any statute of limitation: see section 25 (2) of the Judicature Act, 1873. I prefer, therefore, to base this judgment on the provisions of section 10 of the Indian Limitation Act. Here it is important to remember that the defence is a bare denial of the trust; that plea is found against the defendant and we are left, as I have explained, to the conclusion that the trust money has been misappropriated, that is, spent on objects unconnected with the trust. In such a case it is difficult to see why the plaintiffs should be placed in any worse position than they would occupy if it appeared that the money had been spent in breach of the trust in purchasing other property which could now be identified; and the formal objection based on the disappearance of the fund *in specie* may be met by the consideration that the moneys removed from his estate by Jagjivandas should be deemed to be moneys which he was

authorised to remove, and not moneys which it would be fraudulent for him to remove: see *In re Hallett's Estate. Knatchbull* v. *Hallett*(1). So, as to the argument that "money has no earmark," that doctrine has long been very limited, and, as at present understood, only means that a person who *bona fide* takes money as currency is not affected by any want of title in the person from whom he received it: see *Miller* v. *Race*(2) and *Moss* v. *Hancock*(3). But here we are not concerned with any claim on a transfer for valuable consideration, and it would seem, therefore, that the character of the trust property affords no reason for excluding the suit from the operation of section 10. That being so, I am of opinion that, under the decisions of special authority in India, the section should be held applicable to the present suit. In *Balwant Rao* v. *Puran Mal*(4) the question of the interpretation of the phrase "following the property" in this section came before the Privy Council, and their Lordships laid it down that the expression "means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section." In *Thackersey Devraj* v. *Hurbhum Nursey*(5) where there was a claim for the return of moneys lost to a trust, Mr. Justice Scott in applying this decision says "I think the section is satisfied if the money can be traced to the trustees' hands, and if the loss can be shown to have been caused by their misconduct and improper dealing with it; otherwise every improper use of trust money in trade or speculation would be beyond the application of the section." The same view commended itself to a Division Bench of the Madras High Court in *Sethu* v. *Subramanya*(6) where the plaintiff, as manager of a temple, sued to recover a certain sum alleged to have been part of the temple funds and to have been misappropriated by a former manager. The objection that the money could not be followed *in specie* was disallowed, and the suit was held to fall within the ambit of section 10.

(1) (1880) 13 Ch. D. 696.
(2) (1758) 1 Burr. 452.
(3) [1899] 2 Q. B. 111.
(4) (1883) 6 All. 1 at p. 9.
(5) (1883) 8 Bom. 432 at p. 469.
(6) (1887) 11 Mad. 274.

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For the reasons which I have indicated I think that, following these decisions, we ought to hold that the present suit is not barred by lapse of time. It is a suit to recover for the trust property which, on the case most favourable to the defendant, has been used for some purpose other than the proper purpose of the trust, and no bar of limitation can arise.

The result is that we must reverse the decree of the lower appellate Court, and restore the decree of the Subordinate Judge except as to the part decreeing the claim against the defendant personally. That claim must be left to be substantiated, if possible, in execution: the clause as to defendant's personal liability will be deleted, but the decree of the Subordinate Judge is otherwise affirmed, and the defendant must bear all costs throughout.

HEATON, J.:—The chief argument addressed to us, was that the facts found do not disclose a trust. It seems to me that they bring the matter precisely within the definition of trust given in section 3 of the Indian Trusts Act, for there was trust property, the money deposited for a bride's *palla*; there was an author of the trust, the bridegroom's father; a person beneficially interested in the preperty, the bride; and a trustee, the bride's father. It also seems to me to be clear on the facts that the trust was for a specific purpose, as there was a deposit of a sum of money for a definite and well understood object, *viz.*, the *palla* of the bride. The trust therefore was one of the class contemplated by section 10 of the Limitation Act. The suit, as the pleadings, the judgment of the First Court and the decree of that Court show, was treated as a suit to follow the trust property. The Court of first appeal thought that substantially it was a suit of the nature described in article 98 of schedule II to the Limitation Act, *viz.*, a suit to recover the amount and make good the loss, if any, occasioned by a breach of the trust, out of the estate of the deceased trustee. But that conclusion was largely founded on the assumption that there was not a trust of the kind contemplated in section 10, and on a conjecture, not amounting to a finding of 'fact, that there may have been a breach of the trust. The assumption was wrong as has been

already explained; and the conjecture is too vague to accept as a basis for decision. That being so, there remains in my mind no doubt that the suit was one to follow the trust property. It might conceivably have been met in various ways, but the one selected and pressed in the Courts below and here, was that there was not a trust; or at least no trust such as is contemplated in section 10. It was not asserted, much less found as a fact, that even if there was such a trust, there was no trust property which could be followed. The facts established indicate that there is trust property which can be followed. It is found that the bride's father received Rs 366 in trust or in other words that there was in his possession a sum of Rs. 366 as trust property. It is not definitely found what became of that sum, but it was argued in this Court on behalf of his present representative that it was a deposit with the bride's father, and as such became his property, for which he was responsible only as a debt requiring to be repaid. The argument assumes that there was no trust and is therefore wrong: but it also assumes that the money became merged in the estate of the bride's father; and that assumption may be accepted as a statement of fact not adverse to the interest of his representative, the respondent. It also appears to be the fact found or assumed in both the Courts below. It being found that there was trust money which became merged in his own property, it follows that the trustee's estate was trust property which could be followed to the extent necessary to discharge the trust. The facts found do not establish anything which enables it to be said that the estate has so changed its character that it can no longer be properly described as trust property capable of being followed. The question of following trust property is clearly and comprehensively expounded in the case of *In re Hallett's Estate*[1], and it is unnecessary for me to refer to any other authority.

For these reasons I concur in the order proposed by my learned colleague.

Decree reversed.

R. R.

(1) (1880) 13 Ch. D. 696.

APPELLATE CIVIL.

Before Mr. Justice Batchelor.

1908. *March* 31.

SHIDAPA BIN RYAWAPA (ORIGINAL PLAINTIFF 1), APPELLANT, *v.* VENKAJI KRISHNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 335—Limitation Act (XV of 1877), Schedule II, Article 11—Purchasers at Court-sale—Obstruction to delivery of possession—Obstructor manager of joint family consisting of minors—Partition between obstructor and minors—Allotment of the property to the share of minors—Withdrawal of the obstructor by default without notice to minors—Design on the part of the obstructor—Order awarding possession to purchasers—Suit by minors to recover possession—Limitation.

Certain purchasers of lands at a Court-sale applied to be put in possession of the property but the delivery of possession was obstructed by one V. who was the manager of a joint family consisting of himself and his two minor step-brothers. While the obstruction proceedings were pending a *farkhat* or settlement on partition had been arrived at between the obstructor and his two minor step-brothers and the lands had fallen to the share of the minors. V. thereupon designedly withdrew from the obstruction proceedings by allowing them to be dismissed for default, without giving notice of his abandonment to the minors and an order was passed awarding possession to the purchasers in the absence of any appearance by V. The order was passed on the 6th August 1898. The *farkhat* or settlement on partition, which for its validity required the sanction of the Court, had never received that sanction and it was subsequently set aside at the instance of the plaintiffs. In the year 1903 the plaintiffs, that is, the step-brothers of V. to whom the lands had been allotted, brought a suit to recover possession of the lands. Both the lower Courts held the suit to be barred under Article 11, Schedule II, of the Limitation Act (XV of 1877).

Held, on second appeal by plaintiff 1, that the suit was not time-barred under Article 11, Schedule II, of the Limitation Act (XV of 1877) as the minors were not "efficiently represented."

Padmakar Vinayak Joshi v. *Mahadev Krishna Joshi*(1) followed.

The withdrawal of V. by default from the obstruction proceedings was designed by him (as appeared from the circumstances) in order to deprive the minors of an opportunity of being heard. The minors had no opportunity of protecting their interest which V. had abandoned without notice to them or to any one on their behalf.

* Second Appeal No. 706 of 1907.

(1) (1885) 10 Bom. 21.

SECOND APPEAL from the decision of Vishvanath V. Wagh, First Class Subordinate Judge of Bijápur with appellate powers, confirming the decree of D. A. Idgunji, Second Class Subordinate Judge of Bágalkot.

The lands in dispute originally belonged to one Venkaji Krishna who had mortgaged them to Mahalingapa and Kudlepa in 1888. Subsequently he sold the equity of redemption to one Virupaksha who was the manager of the undivided family consisting of himself and his two minor step-brothers Shidapa and Basapa. Under the purchase Virupaksha had agreed to redeem the mortgage of Mahalingapa and Kudlepa, but he having failed to do so a decree was passed on the mortgage for the recovery of the debt by the sale of the lands. In execution of the decree the lands were sold and they were purchased by Dyawapa and Hanmapa. The purchasers sought to recover possession of the lands and they were obstructed by Virupaksha on the 20th January 1898. Thereupon the purchasers applied for the removal of the obstruction, and while the proceedings under their application were going on, a partition was effected between Virupaksha and his two minor step-brothers on the 6th June 1898 and the lands in suit fell to the share of the minors under a *farkhat*, that is, deed of settlement. Owing to the partition Virupaksha withdrew from the said proceedings by remaining absent, but he did not give notice of the withdrawal to the minors. He had received a letter from his pleader to the following effect :—

"Steps are taken to get your obstruction removed, but it is unnecessary for you to oppose them The lands are allotted to the shares of others and there is nothing which you ought to do in connection with them; as I did not know all this I had asked for a *vakilpatra* and your written statement . . . . I have not filed the *vakilpatra*. Orders will be passed to put the purchasers in possession. Those to whom the lands are allotted may, if they choose, offer obstruction hereafter. If we now inform their names to the Court, notices will be issued to them. They will come on that day and contend that the *farkhat* is false. If that contention goes on here it is not proper."

On the 6th August 1898 the Court passed an order awarding possession to the purchasers under section 335 of the Civil Procedure Code (Act XIV of 1882) in the absence of any appearance by Virupaksha.

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The partition evidenced by the *farkhat* of the 6th June 1898 proved abortive, it having been impugned by Virupaksha's step-brother Shidapa and it did not receive the sanction of the Court.

On the 11th November 1903 Shidapa, who had in the meanwhile attained majority, and his minor brother Basapa brought the present suit for the recovery of the lands against Venkaji Krishna, the original owner, as defendant 1, Mahalingapa and Kudlepa's widow Fakirawa, the mortgagees, as defendants 2 and 3, and Dyawapa and Hanmapa, the auction purchasers, as defendants 4 and 5.

The defence common to all the defendants was that as Virupaksha had failed in his attempt to cause obstruction to the delivery of possession to defendants 4 and 5, he had put up the plaintiffs to bring the suit, that the plaintiffs were bound by the order against Virupaksha who was the manager of the family, and that the suit was time-barred under Article 11, Schedule II, of the Limitation Act (XV of 1877), as it was not brought within one year from the date of the Court's order removing Virupaksha's obstruction.

The Subordinate Judge found that the plaintiffs were bound by the *ex parte* order against Virupaksha and that the suit was time-barred. He therefore dismissed the suit. The minor Basapa died while the suit was pending in the Subordinate Judge's Court.

Shidapa having appealed the Judge confirmed the decree.

Shidapa preferred a second appeal.

K. H. Kelkar for the appellant (plaintiff 1).

G. S. Mulgaumkar for respondents 1, 2 and 3 (defendants 1, 2 and 3).

V. V. Ranade for respondents 4 and 5 (defendants 4 and 5).

BATCHELOR, J.:—The facts necessary for the determination of this appeal lie in small compass, and are not open to ambiguity. In both Courts below the plaintiffs' suit has been dismissed as barred under Article 11 of the Limitation Act inasmuch as it was instituted more than a year after an order passed under section 335, Civil Procedure Code, against the plaintiffs' step-brother

Virupakshapa. That order was made in favour of the defendants 4 and 5, to whose possession Virupakshapa had offered obstruction. Both lower Courts have held that the plaintiffs are bound by the order under section 335 on the ground that they were represented by Virupakshapa in the miscellaneous proceeding which resulted in that order. The only question in appeal is whether the plaintiffs are so bound or not. It appears to me that they are not bound.

The question must turn upon the circumstances in which the order was made, and I must therefore refer briefly to those circumstances. In January 1898 the Court-sale purchasers, defendants 4 and 5, applied to be put in possession of the property, but delivery of possession was obstructed by Virupakshapa on 20th January 1898. At this time Virupakshapa was in possession as manager of the joint family which included his minor step-brothers, the present plaintiffs. On 6th August 1898 the order under section 335 was made awarding possession to the purchasers in the absence of any appearance by Virupakshapa: in other words, Virupakshapa, who was responsible by his obstruction for the beginning of these proceedings, afterwards withdrew from them and allowed an order to be made against him. It is perfectly plain why he did so. On 6th June 1898, that is, during the pendency of the proceedings, a *farkhat* or settlement on partition had been arrived at between the members of the family, and the lands in question had fallen to the share of the plaintiffs, then minors In these circumstances, Virupakshapa, acting upon his pleader's advice, took no further part in the miscellaneous proceedings. The pleader's letter to Virupakshapa is quoted in the judgment of the learned Subordinate Judge, and certain passages may be repeated here. "Steps are taken," writes the pleader, "to get your obstruction removed, but it is unnecessary for you to oppose them; the lands are allotted to the shares of others, and there is nothing which you ought to do in connection with them . . . . . . Orders will be passed to put the purchasers in possession. Those to whom the lands are allotted may, if they choose, offer obstruction hereafter. If we now inform their names to the Court, notices will be issued to them. They will come on that day and

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contend that the *farkhat* is false." It is clear therefore that Virupakshapa withdrew from the miscellaneous proceedings in reliance on the *farkhat* as severing his interests from those of the other members of the family. It should be added that this *farkhat* of 1898, which required for its validity the sanction of the Court, never received that sanction. It was impugned by the plaintiffs who after a great deal of litigation eventually succeeded in getting it set aside. Finally another compromise was effected and received the sanction of the Court in 1902.

Now the question is whether Virupakshapa represented his step-brothers when the order under section 335 was made. In support of the affirmative view it is urged that unquestionably he represented them when the proceedings were begun, and that he must be held to have continued to represent them inasmuch as their interests were never severed, the *farkhat* of 1898 never having become operative. Even if he himself made a mistake as to the effect of the *farkhat*, that mistake, it is argued, cannot alter the legal position, which was that the family remained joint, and he remained the manager. That, no doubt, is true, so far as it goes; but in my opinion it does not go far enough. For, granted that the family remained in law joint under the management of Virupakshapa, the question still remains whether the minors were "efficiently represented" to use the language of Sir Charles Sargent, C. J., in *Padmakar Vinayak Joshi* v. *Mahadev Krishna Joshi*[1]. And to that question I think there can be but one answer. Not only did Virupakshapa not assume to act on behalf of the minors but he deliberately withdrew from the proceedings and refused to act at all. Nor does the case rest there, for it is clear from his pleader's letter that his withdrawal was designed in order to deprive the minors of an opportunity of being heard. This design was apparently accomplished, for it is nowhere suggested that the minors had any opportunity of protecting their interest, which Virupakshapa had abandoned without notice to them or to anyone on their behalf. Indeed it seems a clear inference that Virupakshapa's only object was the establishment of the *farkhat*, which the Courts afterwards set aside; and to this end

(1) (1885) 10 Bom. 21.

he was working in his own interests and against the interests of the minors. His withdrawal from the miscellaneous proceedings was part of his general scheme, and I am of opinion that that withdrawal cannot be held to have bound the plaintiffs under Article 11 of the Limitation Act. Even if the miscellaneous proceedings had been contested to the end by Virupakshapa, that fact by itself would not necessarily prove that the minors were adequately represented; and here the abandonment of the proceedings and the proved circumstances in which that abandonment occurred show that the minors were not represented when the order under section 335 of the Civil Procedure Code was made.

As this is the only point on which the decree of the Court below is based, I must reverse that decree and remand the suit for trial on the other issues. Costs to abide the result.

Decree reversed and suit remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908.
April 15.

JANGLUBAI KOM SHIVAPPA TELANGI (ORIGINAL PLAINTIFF), APPELLANT, *v.* JETHA APPAJI MARWADI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Mitākshara—Succession—Stridhan—Maiden's stridhan—Priority between maternal grandmother and father's mother's sister.

Under the Mitākshara, the father's mother's sister is entitled to succeed to the stridhan of a maiden in preference to her maternal grandmother.

SECOND appeal from the decision of C. A. Kincaid, District Judge of Poona, reversing the decree passed by Gulabdas Laldas, First Class Subordinate Judge at Poona.

Suit for declaration of heirship.

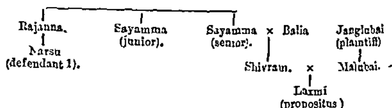
* Second Appeal No. 33 of 1907.

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The plaintiff brought a suit for a declaration that she was a preferential heir to one Bai Laxmi. The defendants were representatives of Sayamma (junior), who was Laxmi's father's maternal aunt.

The relationship between the parties is shown by the following genealogical tree:—



Bai Laxmi was the daughter of one Shivram, who was the adopted son of Balia. Shivram died on the 13th October 1897, and his mother Sayamma (senior) died four days later. Shivram's widow Malubai died shortly after: and Laxmi died on the 5th December 1897.

The parties were Kamathis of Poona.

On Laxmi's death, Sayamma (junior) entered into possession of the property.

The plaintiff thereupon sued for a declaration that she was entitled to the property.

The Subordinate Judge decided the suit in the plaintiffs' favour: but on appeal this decree was reversed by the District Judge who decided that Sayamma (junior) was a preferential heir to Bai Laxmi.

The plaintiff appealed to the High Court.

G. K. Dandekar for the appellant:—The parties between whom the contest lies in this case are *bandhus*. There are three classes of *bandhus*: *atmabandhus*, *pitribandhus* and *matribandhus*. *Atmabandhus* are preferred to the other two, among whom *pitribandhus* are entitled to succeed in preference to *matribandhus*. The appellant is the maternal grand-mother of Laxmi, and is her *atma-bandhu*. She is, therefore, entitled to succeed.

Even supposing that the appellant is a *matribandhu*, we submit that the property in dispute being *stridhan*, a *matribandhu* should

be preferred to a *pitribandhu*; for according to Vijnáneshwara, propinquity or blood relationship is the determining factor in cases of succession.

V. G. Ajinkya for the respondent :—Taking the second contention first, it is clear that the preference assigned by Vijnáneshwara to the mother over the father, is limited strictly to the two relations named, and in the absence of the mother and the father the property goes to the nearest relatives, that is, the nearest *sapindas* of the father.

According to this test, Sayamma (junior), who is related to Bai Laxmi through her father, is entitled to succeed.

CHANDAVARKAR, J. :—The question of Hindu law on this second appeal relates to the succession to the *stridhan* of an unmarried female, the competing claimants in the case being her maternal grand-mother and her father's mother's sister.

The Subordinate Judge, in whose Court the suit was filed by the maternal grand-mother, decided it in her favour and awarded the claim.

The District Judge, on appeal, has reversed the Subordinate Judge's decree, holding that the father's mother's sister, as a *pitru-bandhu* of the *propositus*, is entitled to succeed in preference to the maternal grand-mother because the latter, being a *matri-bandhu*, can come in only in default of *pitru-bandhus*.

Both the Courts below have dealt with the question of succession on the principle that he who is the nearest *sapinda* of the propositus, who in this case is an unmarried female, is entitled to inherit her *stridhan*. But the succession to such *stridhan* is regulated by a special rule which is contained in a text of Baudhyayana. The Subordinate Judge nowhere notices it. The District Judge cites it and his judgment proceeds upon it.

The text in question is given by Vijnáneshwara in the Mitákshara as follows :—

"For Baudhyayana says :—'The wealth of a deceased damsel, let the uterine brothers themselves take. On failure of them, it shall belong to the mother; or, if she be dead, to the father.'"

The text is silent on the question what is to happen and who are the heirs of an unmarried female, if she dies leaving neither

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a uterine brother, nor mother nor father. The Vira Mitrodaya supplies the omission and answers the quesiton. After pointing out that in the case of a female, married according to one of the blamed rites, her stridhan goes, in default of daughters and sons and those included in those terms, to her parents, and that among parents the mother precedes the father, Mitra Misra, author of the Vira Mitrodaya, observes that the succession to an unmarried female is regulated by Baudhyayana's text, which he quotes as above. And then he continues:—

"In default of the mother and the father, it goes to their nearest relations." [The Vira Mitrodaya translated by Golap Chandra Sarkar, Shastri, page 241, section 9.]

According to this rule, in default of the heirs specified by Baudhyayana the *sapindas* of the parents of a maiden inherit her property in the due order given in the text of Yájnyavalkya regulating obstructed succession. The same rule holds good in the case of succession to a woman married according to one of the blamed rites and dying without any of the specified heirs in her case surviving. In her case, the order of heirs specifically enumerated is as follows:—(1) daughters; (2) daughter's daughters; (3) sons of daughters; (4) sons and (5) grand-sons. In the case of a maiden, the order of heirs specifically enumerated is: (1) brothers; (2) mother; and (3) father. In either case, in default of these enumerated heirs, the same rule of succession applies—that is, the estate goes to "the nearest relations" of the parents of the deceased, whether she be a maiden or a woman married according to one of the blamed rites.

The reason of this is that the latter, having been married according to the blamed rites, continues to belong to her father's *gotra* (family), according to the Hindu Shástras, because in such marriages there is no giving away (*kanyádána*) of the bride by the father to the bride-groom. [See this explained in the judgment of this Court in *Bhagwan* v. *Warubai*.[1]] Therefore her position, so far as her *gotra* is concerned, being similar to that of her unmarried sister, she is treated for the purposes of

(1) *ante* p. 300: 10 Bom. L. R. 389.

succession to her *stridhan* like an unmarried female, where she dies leaving none of the specifically enumerated heirs.

Then comes the question—what is meant by "the nearest relations" (sapindas) of the parents? Does it mean the *sapindas* who are common to both, or the *sapindas* of the mother first, and the *sapindas* of the father afterwards?

There can be no doubt that the *sapindas* of the father are the *sapindas* of the mother also, because the mother, as his wife, has her individuality merged in him, according to one of the leading doctrines of the Mitákshara. When, therefore, we speak of the sapindas, *i. e.*, the nearest relations of the parents, it means the *sapindas* of the father, who are also *sapindas* of the mother in virtue of her identity with her husband as half of his body. It may indeed be objected to this that this common *sapindaship* with reference to the father's *sapindas* must be held to be absent where the mother was married according to one of the blamed rites, because, as we have said above, in such marriages, the mother continuing in her father's family notwithstanding her marriage, her husband's *sapindas* cannot be her sapindas, who must be looked for in her father's family. The answer to the objection is that *sapindaship*, according to Vijnáneshwara, is constituted as between husband and wife by their jointure; whatever the form of marriage, they are one, so to say, in body; and by relation to his body she becomes a *sapinda* of his. The converse of that, however, does not follow and is not propounded by Vijnáneshwara—that is, the wife's *sapindas* in her father's family do not become the husband's. The reason is the wife's subordinate position and dependence.

In default of *parents*, therefore, the succession to the *stridhan* of an unmarried female goes to the *sapindas* of her father, and if these fail, the kinsmen of the deceased woman herself (her own *sapindas*) become entitled to inherit in the order of propinquity. This is obvious from the fact that, after quoting and explaining the texts of Yájnyavalkya, enumerating the different kinds of *stridhan*, Vijnáneshwara quotes the text which lays down the general rule regulating succession to it as follows:—

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"Her kinsmen take it, if she die without issue." [The Mitak. Ch. II, section XI, plac. 8, Stokes's Hindu Law Books, page 460.]

Vijnáneshwara, in explaining this and the following text, says:—

"The kinsmen have been declared generally to be competent to succeed to a woman's property."

Then he proceeds to enumerate the specified kinsmen—who these are in the case of a woman married according to the approved rites, or of one married according to the blamed rites or of a maiden. The specific enumeration, in which must be included the *sapindas* of the parents for the reasons above given, stopping there, the general rule above quoted must take effect. According to it, the kinsmen of the deceased woman herself become heirs in default of those specified. And this is in conformity with one of the leading rules of inheritance in Hindu Law: "Whoever is the nearest *sapinda* of a deceased person, to him the inheritance goes"—a rule of general application operating where all special rules of inheritance cease to apply.

It has been strenuously urged, however, before us by the learned pleader for the appellant that in the case of succession to the *stridhan* of a maiden, in default of parents it must go to the *sapindas* of her mother first and that it is only on failure of them that the *sapindas* of the father are entitled to come in. For the purposes of this argument the learned pleader interprets the expression "their nearest relations" in the rule mentioned by the Vira Mitrodaya above quoted—namely, "in default of the mother and the father, it goes to their nearest relations"—in a distributive, not in a conjunctive, sense, as meaning the nearest relations of the mother and, in default of them, the nearest relations of the father.

It is impossible to adopt this construction. Assuming that the words must be construed distributively, the mother's *sapindas* would be entitled to precedence over the father's on no other ground than that the mother inherits before the father. But this right of precedence given to the mother by Vijnáneshwara is obviously personal and there is not a single instance where he

has extended that right to her relations. On the other hand, the fact that he mentions the *pitru-bandhus* (father's cognate kindred) as coming in as heirs before the *matri-bandhus* (mother's cognate kindred) in cases of obstructed succession shows that wherever the right of precedence is given to the mother it is purely personal. The observations and authorities cited in the judgment in *Saguna* v. *Sadashiv*[1] support our view.

The conclusion we have arrived at has this further merit that it brings the Mitákshara in conformity with the Mayukha. For these reasons we confirm the decree with costs.

Decree confirmed.

R. R.

(1) (1902) 26 Bom. 710 at p. 715.



List of the Books and Publications for sale which are less than two years old.

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[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No 8, Hastings Street, Calcutta]

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REVISED EDITION.

Super-royal 8vo., cloth lettered.

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[T]he Bengal Code, Third Edition, 1905, containing the Regulations and Local Acts in force in Bengal. Vols. I to V. Rs. 6 a volume or Rs. 30 for set of 5 Volumes.

[illegible]

[T]he United Provinces Code, Volume I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table ... ... Rs. 5. (8a.)

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[T]he Bombay Code, Volume I, Edition 1907, containing the unrepealed Bombay Regulations and the Local Acts of the Governor General in Council, and the Regulations made under the Statute 33 Vict., Cap. 3, in force in Bombay ... ... Rs. 4. (8a.)

In the Press

[T]he Bombay Code, A Digest of Indian Law Cases, 1905 and 1906, by C. E. Grey, Barrister-at-Law.

II.—Reprints of Acts and Regulations of the Governor General of India in Council, as modified by subsequent Legislation.

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Act III of 1864 (Foreigners), as modified up to 1st September 1906. 3a. 6p. (1a.)

Act XXV of [illegible] ...ified up to [illegible] a. (a.)

A[illegible] ... 6a. (1a.)

A[illegible] ... Re 1. (2a.)

A[illegible] November 1906 ... 4a. 6p. (6a.)

Act IX of 1875 [illegible]

Act XI of 1870 [illegible]

Act I of 1878 (C[illegible]

Act VI of 1882 [illegible]

Act XV of 1882 [illegible] 1906 ... 10a. (2a.)

Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906 ... ... 2a. 6p. (1a.)

Act VIII of 1894 (Tariff), as modified up to 1st February 1906 ... 2a. (1a.)

Act XII of 1896 (Excise), as modified up to 1st March 1907 ... Rs. 1, 8a.
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III.—Acts and Regulations of the Governor General of India in Council as originally passed.

Acts (unrepealed) of the Governor General of India in Council from 1908 up to date.
Regulations made under the Statute 33 Vict., Cap. 3, from 1905 up to date.

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1908.

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If the Court comes to the conclusion that the main original object for which the Company was formed has substantially failed or that the substratum of the

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to wind up . The Court ground that

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CONTRACT ACT (IX OF 1872), sec 24—*Criminal Procedure Code (Act V of 1898), sec. 513—Criminal prosecution—Bail for appearance—Nominal sale-deed*

the defendant his pleader entered into a bail bond for his appearance. To indemnify the pleader against any loss which he might suffer under the bail bond, a nominal sale-deed and a nominal rent-note were passed by the defendant to the plaintiff.

The plaintiff having subsequently brought a suit to recover two years' rent with interest on the strength of the rent-note the defendant met the claim by a denial that the property belonged to the plaintiff.

Herman v. *Jeuchner* (1885) 15 Q. B. D. 561, referred to.

Held, further, that as the sale-deed and rent-note, which latter was merely intended to secure interest on the principal sum, were part and parcel of one single transaction, the rent-note was tainted with the same illegality which affected the sale-deed and was therefore also void.

Part of a single consideration for one object being unlawful, the whole agreement is void under section 24 of the Contract Act (IX of 1872).

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COSTS—*Order for taxation—Business not transacted in Court—Practice—High Court Rules, Rule No. 544.*

CRIMINAL PROCEDURE CODE (ACT V OF 1898), sec. 513—*Criminal prosecution—Bail for appearance—Nominal sale deed and rent-note passed to indemnify bail—Suit for recovery of rent—Sale-deed void as opposed to public policy—Rent-note and sale-deed part and parcel of same transaction—Rent-note void—Contract Act (IX of 1872), sec 24.*

DECREE ON MORTGAGE—*Payment by instalments—Sale on default in payment of an instalment—Application to make the decree absolute—Extension of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for payment by instalments—Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 15B, cls. (1) and (2).*

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has extended that right to her relations. On the other hand, the fact that he mentions the *pitru-bandhus* (father's cognate kindred)

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in the Shah Steam Navigation Company of India, Limited, for the compulsory winding up of that Company by the Court under section 128 of the Indian Companies Act.

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Lowndes, for the petitioner:—The Company has been carried on at a loss. We estimate the losses at 4 lacs. We admit we do not come within the first four clauses of section 128, Indian Companies Act, but submit that under clause (*e*) the Court can act. The circumstances of the case make it just and equitable to wind up the Company. The whole substratum of the Company is gone; it is on the verge of insolvency. See *In re Haven Gold Mining Company*(1); Palmer's Company Precedents, part 2, p. 43 (8th edition); *In re German Date Coffee Company*(2); *Re Red Rock Gold Mining Company, Limited*(3); *In re Amalgamated Syndicate*(4); *In re Suburban Hotel Company*(5). We admit one of our objects is to get rid of the agents.

Strangman, for certain shareholders supported the petition.

Jardine, for the Company opposed the petition:—It is not enough to allege vaguely that it is just and equitable that the Company should be wound up. See *In re Rica Gold Washing Company*(6). The remedy for mismanagement is to get the directors to call a meeting. *In re Professional, Commercial, and Industrial Benefit Building Society*(7).

Even assuming that the Company is a losing concern as alleged by the petitioner that does not make it just and equitable that the Company should be wound up. *In re Suburban Hotel Company*(8); and *In re The Factage Parisien*(9).

A shareholder has no right to stop the Company's business when a large majority of the Company's shareholders wish to go on. *In re Middlesborough Assembly Rooms Company*(10); *Re The Patent Artificial Stores Company*(11). See also *In re Langham Skating Rink Company*(12).

Padshah, for certain shareholders also opposed the petition. He referred to *In re Joint Stock Coal Company*(13) and *In re Spence's Patent Non-conducting Composition and Cement Company*(14).

(1) (1882) 20 Ch. D. 151.
(2) (1882) 20 Ch. D. 169.
(3) (1889) 61 L. T. 785.
(4) [1897] 2 Ch. 600.
(5) (1867) L. R. 2 Ch. 737 at p. 746.
(6) (1879) 11 Ch. D. 36.
(7) (1871) L. R. 6 Ch. 856.
(8) (1867) L. R. 2 Ch. 737.
(9) (1864) 13 W. R. 214.
(10) (1880) 14 Ch. D. 104.
(11) (1864) 34 Beav. 185.
(12) (1877) 5 Ch. D. 669.
(13) (1869) L. R. 8 Eq. 146.
(14) (1869) L. R. 9 Eq. 9.

DAVAR, J. :—On the 19th of November 1907 the petitioner Haji Ahmed Hassam who holds shares of the nominal value of Rs. 75,000 in the Shah Steam Navigation Company presented a petition in Chambers praying that the Company " may be wound up under the provisions of the Companies' Act VI of 1882, and that for such purpose all necessary and proper directions may be given." At the hearing of the petition before me on Saturday the 21st of December 1907, Mr. Strangman representing shareholders who held 385 shares appeared in support of the petitioner. Essaji Tajbhoy who holds 851 shares and his son Gulam Hussein who holds 51 shares, were represented before me by their solicitor, Mr. Dinsha, who also supported the prayer of the petition.

Mr. Jardine appeared for the Company and opposed the petition. He was supported by Mr. Padshah who represented shareholders who held 1,915 shares. Messrs. Adamji Peerbhoy and Sons, the Agents of the Company, also opposed the petition and were represented by their solicitor, Mr. Merwanji. This Company was registered as a Joint Stock Company on the 18th of August 1906. The capital of the Company is 30 lacs of rupees divided into 12,000 shares of Rs. 250 each. The capital of the Company paid up till now is Rs 11,25,000. The remaining shares have not been issued. The objects of the Company as set out in the Memorandum of Association are many and multifarious. The principal object, however, was to acquire, as a going concern, from the firm of Messrs Essaji Tajbhoy their business of plying steamers which the said Essaji and his son Gulam Husein were carrying on before the incorporation of the Company. This business *was* acquired, but very soon afterwards grave differences arose between the Company and Essaji and his son, and the Company,—in terms of the agreement between the promoters of the Company and the firm of Essaji Tajbhoy subsequently adopted and ratified by the Company—returned to the vendors seven out of nine steamers purchased from the said Messrs. Essaji Tajbhoy. Heavy litigation is now pending between the Company and the firm of Essaji and the petitioner is a party defendant to one of the suits filed by the Company and now pending.

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The application to wind up the Company is made under section 128 of the Companies' Act. This section is a verbatim reproduction of section 79 of the English Companies' Act of 1862 except that in clause (*e*) of the section in our Act the words "for any other reason of a like nature" are added. It was admitted by Mr. Lowndes, who appeared for the petitioner, that his application did not fall within any of the first four clauses of the section but he relied on clause (*e*) of the section and argued that there were "other reasons of a like nature" as were mentioned in the first four clauses, which rendered it "just and equitable" that the Company should be wound up by the Court. Those other reasons of a like nature, on which Mr. Lowndes relied, are set out in the petition. The petitioner and the shareholders who support him have not the statutory majority of "not less than three-fourths of the members of the Company entitled to vote" so as to enable them to pass "a Special Resolution requiring the Company to be wound up by the Court". The Company *did* commence its business within a year from its incorporation and has not "suspended its business for the space of a whole year." The members are not reduced to less than seven and the Company is able to pay its debts. The application of the petitioner must, therefore, fall within the provisions of clause (*e*) of the section and before I can grant the prayer of the petition, I must be of opinion for other reasons of a nature similar to those set out in the first four clauses of the section that it is just and equitable that the Company should be wound up.

In the case of the *Suburban Hotel Company*[1] decided under the corresponding section of the English Companies' Act, Lord Cairns, L. J., held that the fifth head of section 79 of the Companies' Act, 1862, is restricted to matters '*ejusdem generis*' with the four previous heads and does not authorise the Court to wind up a solvent Company against the wish of the majority of shareholders because the business has been carried on at a loss and appears likely to continue a losing concern. This is a case of 1867. It appears, however, that this old rule, that the words just and equitable in clause 5 of section 79 of the English Companies'

(1) (1867) L. R. 2 Ch. 737.

Act of 1862 are to be construed as relating only to matters *ejusdem generis* with the grounds for winding up mentioned in the earlier parts of the section—has of late been considerably relaxed. In *In re Amalgamated Syndicate*[1], decided in 1897, Vaughan Williams, J., in the course of discussion with Counsel and at the end of his judgment, remarks that the stringency of the *ejusdem generis* rule had been more or less relaxed of late. In Palmer's Company Law, 5th edition (1905), at page 334, with reference to the "just and equitable" clause it is stated:—"It was at one time thought that these words must be confined to cases *ejusdem generis* with the previous cases but this rule is now *discredited*." The Courts in England seem to have therefore under the "just and equitable" clause of the section of their Act unfettered discretion to consider any and all reasons which may be urged as making it just and equitable that the company should be wound up. It would be a very interesting question to consider whether the introduction or retention of the words "for any other reason of a like nature" in clause (*e*) of section 128 of the Indian Companies' Act is not intended to restrict the discretion of the Indian Courts to reasons *ejusdem generis* with the four previous clauses of the section.

If I were inclined to hold that the words "for any reason of a like nature" in the Indian Act gives to Courts in India a more restricted discretion than the English Act confers on the English Courts and that in considering whether it is just and equitable to wind up a Company I must be guided by reasons of a nature similar to those mentioned in the first four clauses of the section, then the petitioner, in my opinion, must fail for there are no *other* reasons of a like nature to be found anywhere in the petition or in the affidavits filed in support of the petition. What was urged before me was that three at least of the requirements of the section have been partly established. It was urged that although the petitioner has not the statutory majority of three-fourths to enable him to get a Special Resolution passed he still had a majority on his side—that although the Company had not suspended its business for

(1) [1897] 2 Ch. 600.

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the space of a whole year it had ceased to do any business since August 1907—and that although it was not unable to pay its debts, it was only able to pay its debts from the capital. It could hardly, I think, be contended that when the law requires the fulfilment of one or more of several conditions before an order could be made that the part fulfilment of two or more of such conditions should be taken as having cumulative effect justifying the order. Mr. Lowndes, for the petitioner, in his reply summed up all his grounds for asking for an order compulsorily winding up the Company. They are:—

(1) A majority of the shareholders of the Company do not wish to go on.

(2) The Company has done no business since August last.

(3) The Company is making losses and paying out of its capital, and

(4) The real object of the Company was to go on with Essaji's business but that is gone.

The first three grounds thus urged are only part compliance with some of the requirements of section 128 of the Indian Companies Act and taken either each by themselves or together would not justify an order for compulsory winding up.

In considering the fourth ground that the real object of the Company is gone and taking that ground with the other grounds urged I am willing in this matter to construe clause *(e)* of the section as widely as the corresponding clause in the English Act and I propose to consider the application on the merits on the assumption that I have free and unfettered discretion to consider all and every ground urged in support of the contention of the petitioner that it is just and equitable that the Company should be wound up by the Court.

I have carefully looked into the numerous cases cited by counsel in the course of their arguments before me. I do not think it is necessary to refer to them all or discuss them in detail. In *In re Heaven Gold Mining Company*[1], it was held that where the Court was satisfied that the subject-matter of the

(1) (1882) 20 Ch. D. 151.

business for which the Company was formed had substantially ceased to exist, it will make an order for winding up the company. In *In re German Date Coffee Company*(1) the Court held that where the substratum of the Company had failed and it was impossible to carry out the objects for which it was formed it would be just and equitable that the Company should be wound up.

The effect of the authorities I take it to be this. If the Court comes to the conclusion that the main original object for which the Company was formed has substantially failed or that the substratum of the Company is gone it will consider that it would be just and equitable to wind up the Company and will make an order for its compulsory winding up.

The case *In re Joint Stock Coal Company*(2) is a very strong authority showing that the Court will not make an order to wind up a Company because it has made or is making losses It was there held that a Company which had sustained and was continuing to sustain heavy losses but was still able to meet its liabilities was not to be considered insolvent and the Court in such a case could not make an order to wind it up. Vice-Chancellor Malins, in the course of his judgment, says at p. 153 :—

"In the case of the *Suburban Hotel Company*, my view was, that wherever it was made clear to the Court that the Company in carrying on its business had made a loss, was losing, and was likely to continue losing, that brought it under the class of cases in which it was just and equitable that the Company should be wound up. My decision, however, was overruled by the Court of Appeal, and I am not, therefore, at liberty to direct a winding-up, although I may be of opinion that the Company has lost, is losing, and will continue to lose."

It seems, therefore, quite clear that the Court would not be justified in making a winding up order merely on the ground that the Company has made losses and is likely to make further losses.

(1) (1882) 20 Ch. D. 169. (2) (1869) L. R. 8 Eq 146.

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A case in which the facts are very similar to the facts disclosed in the present case is *In re Langham Skating Rink Company* (1). In that case three of the share-holders of the Company presented a petition for the winding up of the Company. The petition did not allege that the Company was insolvent but stated circumstances showing that its condition was not hopeful and that it had abandoned all but a very small part of its objects and submitted that it was just and equitable that the Company should be wound up. · Vice-Chancellor Bacon, who heard the petition in the first instance, was satisfied on the evidence that the Company was *substantially insolvent* and ordered a meeting of the shareholders to ascertain whether they did not wish to have the Company wound up. The Court of Appeal however held that on that petition no other order ought to have been made except to dismiss the petition. The Court held that the allegations in the petition did not make out a sufficient case for the Court's interference under clause 5 of the section and as the petition did not allege any of the cases mentioned in the first four clauses of section 79 of the Companies' Act the Vice-Chancellor ought to have dismissed the petition. Sir George Jessel, Master of the Rolls, in the course of his judgment referring to the just and equitable clause, says:—

"Now there is no doubt that this last clause gives the power to the Court to wind up a Company in cases not coming within any of the first four heads, but, as was laid down in the case of *In re Suburban Hotel Company* (2), it is a power which must not be acted upon unless there is very strong ground for acting upon it, and for this reason, that these Companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal."

Lord Justice James while concurring in the opinion of the Master of the Rolls observes:—

"It really is very important to these Companies that the Court should not, unless a very strong case is made, take upon itself

(1) (1877) 5 Ch. D. 669. (2) (1867) L. R. 2 Ch. 737.

to interfere with the domestic forum which has been established for the management of the affairs of a Company."

Keeping in view what these authorities lay down let me now turn to the facts of this case and examine the allegations made by the petitioner to see whether he establishes a strong case as is required, or any case at all for the interference of the Court.

When arguing the petition Mr. Lowndes candidly stated to me that one of the objects of the petition was to rescue the Company from the thraldom of its Agents and he complained that the Agency agreement obtained by Messrs. Adamji Peerbhoy and Sons from the Company was a most one-sided and unfair one. The obvious answer to that is that the Company entered into the agreement and the share-holders subscribed shares in the Company—with their eyes open and it is not even suggested that any unfair means were employed or underhand acts were resorted to by Messrs. Adamji Peerbhoy and Sons, in obtaining this agreement. Besides it does not seem to me that the agreement is an unfair one. It was argued that under clause 6 of the Memorandum of Association the firm of Messrs. Adamji Peerbhoy and Sons were to be Agents as long as the Company lasts and that such an appointment for an indefinite period was very detrimental to the interests of the Company. It must, however, be remembered that the Agents as promoters put in a considerable sum of moneys of their own and have a large stake in the Company and they had right to secure to themselves such benefits as the Company chose to agree to. It must also be remembered that the Agents are liable to be removed if they are "found guilty of misconduct or fraud in the management and discharge of their duties as such Agents of the Company". It does not seem to me that there is anything particularly unfair in this appointment simply on the ground that it is for an indefinite period more especially when the terms of their remuneration are taken into consideration. Besides office rent and the expenses of the office establishment the Agents get only ten per cent. on the annual net profits of the Company after making various deductions and the agreement further stipulates that "the Agents shall not be entitled to any commission during the time the

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dividends, after making the aforesaid allowances, fall short of 5 per cent. on the paid up capital for the time being of the said Company". In my opinion the terms of the Agents' remuneration are extremely reasonable and I do not find anything in the agreement obtained by the Agents from the Company that is particularly unreasonable or unfair. I have discussed this point in my judgment because it was forcibly urged on behalf of the petitioners that it was the Agents' firm that was really resisting the winding up of the Company to the detriment of the share-holders because they were anxious to retain to themselves the benefit secured to them as Agents of the Company. It is quite clear that the Agents derive no benefit while the Company is working at a loss or making no profits and it is manifestly to the advantage of the Agents that the Company should make profits. I do not think—having regard to the large stake they themselves have in the Company—that the Agents would resist the winding up of the Company if they were honestly convinced that there were no prospects of working the Company at a profit in the near future.

The only grounds urged for winding up the Company were that the Company had made a loss of Rs. 4,50,000, that there were no prospects of the Company ever working at a profit, that the original object of the Company and its substratum were lost and that the Agents' firm were incompetent to carry on the business of the Company. The principal deponents before me are the petitioner Haji Ahmed Hassum and Alibhoy Adamji Peerbhoy. The statements of the petitioner are in many instances reckless and extravagant. The facts deposed to by Alibhoy are a complete answer to the petitioner's allegations. The loss of Rs. 4,50,000, mentioned in the petition, reiterated by the petitioner, and re-echoed in the affidavit of Golam Hussain Essaji, seems to me to be a gross exaggeration. It is possible that Alibhoy is minimising the loss when he puts it at Rs. 1,67,763 but he certainly furnishes some data to go by, whereas the petitioner has nothing in support of his bare assertion.

If the services of Essaji and his son are lost to the Company the fault is not the fault of the Agents and if there is any truth in the allegations made against them—the Company has no reason to regret the loss of their connection with the Company.

If the Company returned seven of Essaji's steamers I must take it that the Company had grave cause for doing so. The substratum of the Company is by no means gone and the original objects of the Company have not become impossible of accomplishment and are not lost. The Company has already bought other steamers the Ipswich and the Xema and two launches, and there is nothing to prevent the purchase of other steamers. If the Company had to suspend their business for a time and to make losses the blame does not lie with the Agent, but, I think, on the materials before me, lies on other shoulders. There is heavy litigation pending between the Company and Essaji's firm, and in one of the suits the petitioner is a party and I am most anxious to say as little as possible in the present proceedings lest it may be felt that what I may say now, might prejudice either one side or the other in the litigation that is pending A conviction however has forced itself on my mind that this application by the petitioner is not made *bonâ fide* either in the interest of the Company or of its share-holders. It seems to me that this is an attempt to wipe out the Company and make short work of the litigation against Essaji and his son and the petitioner. The Company have obtained an injunction against Essaji and his son and it was stated to me and not contradicted that an appeal is now pending against an order refusing injunction and Rule Nisi for an injunction against the petitioner. Allibhoy says the petitioner is a mere nominee and Agent of the vendors Essaji Tajbhai & Co. That may or may not be so but the fact remains that the petitioner has purchased or is supposed to have purchased some of the steamers returned to Messrs. Essaji by the Company. He was on the Board of the Company's Directors. He knew that Essaji and his son had covenanted not to ply steamers that may be returned to them but that the same should be broken up. The petitioner does not pretend that he has purchased the steamers returned to Essaji for the purpose of breaking them up. He has plied one of such steamers for pilgrim traffic. The petitioner has resigned his seat on the Directorate of this Company and is now a director of the Bombay Steam Navigation Company, Limited. Allibhoy Adamji in his affidavit charges that " the primary object of having this

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SHAH STEAM NAVIGATION COMPANY, *IN RE.*

Company wound up is that the vendors (Messrs. Essaji Tajbhoy) may be released from the covenant against plying steamers" and that "the other objects are to make himself and the vendors escape from liability in respect of their wrongful actions and breaches of covenants". Allibhoy further charges the petitioner as plying the steamers "on behalf of Essaji and his son, on their account in collusion with them, in his name, to ruin the Company". These are grave charges. They may be proved in the end to be unfounded. In view of pending litigation I do not desire to discuss them but I am constrained to say that the admitted facts of the case and the conduct of the petitioner lends strong colour to these allegations.

Then it is said the Agents are incompetent to manage the affairs of the Company. This is no ground for winding up the Company. The Agent's firm promoted the Company and brought it into existence. The competence or otherwise of the Agents must have been known to the share-holders, before they took up shares in the Company. The loss of Essaji's services is made a great deal of in the course of the argument. I am quite satisfied that those services were not lost to the Company by anything done by the Agents. It is not always absolutely necessary that the Agents should personally have knowledge of the business from the very beginning of that business coming into existence. In a city like Bombay Essaji or his son cannot be the only persons who have knowledge of the business of a Company such as this one. There must be dozens of men available to assist the Agents if the Agents require such assistance. In fact they have such a man in Mahomed Yusuf. A most unwarrantable attack is made on this man's character on the strength of an unsuccessful criminal prosecution 10 or 11 years ago at Burmah. This charge was persisted in till the last in spite of the man's oath that he was acquitted by the final Appellate Court at Burmah. The petitioner relied on a copy of the Judicial Commissioner's judgment whereas this man says that the final Appellate Court is that of the Recorder of Rangoon. I accept the statement made by this man to me that he was finally acquitted. That the allegations against his competence are as baseless as those against his character appears fairly clear from the affidavits before me

I am of opinion that the Company has not had a fair trial. It has been handicapped by its disputes and differences with the vendors Essaji Tajbhoy and his son. The petitioner has befriended the vendors and is actively assisting them and this is an attempt to throttle the Company and end the litigation against Essaji and his son and himself.

I am not in the least influenced by any consideration as to which of the parties has a majority of share-holders on its side. The Company's share-holders have taken sides just as they happen to be friendly or otherwise to the contending parties, *viz.*, the Agents and Essaji. Most of them must be acting as is usual in such cases without any clear idea as to real facts or the correct issue between the parties. It seems to me, however, that the share-holders are fairly evenly divided in their opinion. I am not concerned with the question which party has a majority on its side. It is sufficient for present purposes that the petitioner has *not the required majority to get a special resolution for* winding up the Company passed.

Far from having a strong case such as the authorities require to induce the Court to interfere, the petitioner has made out no case whatever for winding up the Company. I am strongly of opinion after hearing this matter discussed by counsel for a whole day and reading every one of the affidavits filed on this petition that it would be both unjust and inequitable to grant the prayer of the petition.

I dismiss the petition and direct the petitioner to pay the costs of the Company, of its Agents Messrs. Adamji Peerbhoy and Sons and of the share-holders represented by Mr. Padshah.

Essaji Tajbhai and his son and the share-holders represented by Mr. Strangman who appeared to support the petition must bear their own costs.

I certify that this was a fit case for employment of counsel.

Attorneys for petitioners: *Messrs. Payne & Co.*

Attorneys for the Company: *Messrs. Bicknell, Merwanji & Romer.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.
January 9.

IN RE THE COSTS AND EXPENSES OF MESSRS. CRAWFORD, BROWN AND Co.

AND

IN RE BAI DOSSIBAI, WIDOW, AND OTHERS.

AND

IN RE JIWAJI FRAMJI MARKER AND OTHERS.

BAI DOSSIBAI, WIDOW OF FRAMJI CAWASJI MARKER, AND ANOTHER, APPELLANTS, *v.* MESSRS. CRAWFORD, BROWN & Co., SOLICITORS, RESPONDENTS AND APPLICANTS.*

High Court Rules, Rule No. 544[1]*—Bill of costs—Order for taxation—Business not transacted in Court—Practice.*

Rule 544 of the Rules of the High Court does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court, unless such order be by consent, and the Court has not any inherent power on which the jurisdiction can be vested.

Sayers v. *Walond*[2], followed.

THIS was an appeal from an order of Mr. Justice Davar made in Chambers.

The facts of the case appear sufficiently from the judgment of the lower Court.

DAVAR, J. :—On the 25th of July 1907 Messrs. Crawford, Brown & Co., Solicitors of this Court, obtained a summons calling upon the respondents to show cause why their bills of costs should not be lodged for taxation and be taxed by the Taxing Master of this Court. The respondents are some of them executors and trustees under the will of the late Mr. Framji Cawasji Marker and some of them trustees under two settlements known as the Charity and the Family Settelments made on the 29th of May 1888.

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* Appeal No. 1503.

(1) By order of the Chief Justice the following Rule was substituted for Rule No. 544 of the High Court Rules, 2nd edition, 1907, as Rule 544 (*vide Bombay Government Gazette* dated 4th February 1908, Part I, page 152) :—

The Taxing Officer shall tax the bills of costs on every side of the Court (except the Appellate Side) and in the Insolvent Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order.

(2) (1522) 1 Sim. & St. 97.

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Some of the respondents did not appear when the matter was brought on for argument before me on the 12th instant. Mr. Runchordass appeared for the respondent, Kaikhoshru Framji Marker, and supported the application for taxation of the bills referred to in Mr. Tenant's affidavit and enumerated in the list annexed to that affidavit and marked A. The respondent, Dinsha Framji Marker, appeared for himself and as a duly constituted attorney for his mother Dossibai and objected to any order being made against him and his mother for taxation of the applicants' bills. He first of all objected to the form of the summons and contended that Messrs. Crawford, Brown & Co. were not entitled to ask for taxations of several bills for costs incurred in several matters in one summons. His next ground of opposition was that some of the costs, claimed by Messrs. Crawford, Brown & Co., were costs unnecessarily incurred by some of the other respondents and the trust estates were not liable to pay the same.

There is no substance in the first contention. In the matter of Messrs. *Wadia, Gandhy & Co.* v. *Purshotam*[1], I have held that the form of procedure by one summons under circumstances similar to the circumstances in these proceedings was perfectly proper. I think it is unnecessary to discuss this further beyond observing that all the respondents are closely connected being widow, sons and son-in-law of the deceased Framji Cawasji Marker, who died having made two settlements and a will prior to his death and all the respondents are either executors and trustees under the will or trustees under one or other of the settlements and that bills sought to be taxed are all in connection with either the will or the settlements.

The directions I propose to give to the Taxing Master will however obviate all difficulties, if any, really exist on the score of there being only one summons in respect of the seven bills sought to be taxed.

On the other point my mind was not free from doubt and I took time to consider the matter before passing my orders on the summons. Rule 544 provides that the Taxing Master, besides

(1) (1907) 32 Bom. 1.

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taxing bills of costs on every side of the Court, etc., "shall also tax all such attorney's bills of costs as he may be directed to tax by a Judge's order on consent of the parties, or on the application of any party chargeable with the bill". This rule gives a party chargeable with the bill power to apply to have his attorney's bill taxed but it makes no corresponding provision enabling the attorney to apply to have his bill taxed without the consent of the party chargeable therewith. If the rule was exhaustive it would be manifestly unfair to the attorneys. I could hardly conceive that the Court when framing the rule and providing a summary remedy in favour of a party would intend to deprive its own officers of the benefit of that summary procedure and leave them to recover their claims by a suit. I do not think the Rule is exhaustive. Apart from the rule the Court has, I think, inherent jurisdiction to make any order that seems to the Court reasonable and necessary in the interests of justice when one of its officers applies to the Court for an order for taxation of his costs due to him by his client. The English practice on this subject and other matters relating to solicitors is mainly governed by the Solicitors Act, 1843 (6 & 7 Vic. c. 73) and other later legislative enactments. See Annual Practice, 1907, p. 406 of Vol. II. That these enactments are not exhaustive and have not taken away from the Court its inherent jurisdication in matters such as the one now before me appears clearly from the pronouncements of the Lord Chancellor, Lord Halsbury in the case of *Storer & Co.* v. *Johnson*[1], where he states as follows:—

"I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solictors Act.... The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit."

(1) (1890) 15 App. Cas. 203 at p. 206.

In this matter Mr. Runchordas' client admits that he is one of the parties chargeable with the bill and he has expressed his willingness to be taken as making this application for the taxation of the applicants' bills if I came to the conclusion that Rule 544 precludes my making the order that is now applied for. I do not think this would help very much as his consent would only affect himself and could not bind the objecting parties.

I think I have power to make the order asked for independently of Rule 544 and I accordingly make the summons absolute and direct that the applicants' bills mentioned in Mr. Tenant's affidavit of the 25th of July 1907 be lodged with the Taxing Master and that the Taxing Master do proceed to tax the same. In taxing these bills the Taxing Master is to have regard to the questions which of the respondents are responsible for which of the bills taxed by him or for how much under each particular bill. The Taxing Master will also take into consideration whether any of the costs were unnecessarily or wantonly incurred, and if so, he will apportion such costs personally against the party or parties incurring the same. He will state in his allocatur, what costs are payable out of the deceased's or the trust estates and what costs are to be payable personally by the respondents or any and which of them.

The applicants are entitled to their costs of this summons. It was necessitated by disputes amongst the respondents *inter se.* I direct that the applicants' costs of this summons to be paid in the first instance by the respondents. I reserve the question as to which of the respondents are liable to pay these costs as between themselves till after the bills are taxed. If the question is not amicably arranged between themselves I reserve liberty to any of the respondents to apply to me in Chambers after the bills have been taxed in the manner I have indicated above.

On appeal—

Inverarity (with him *Scott, Advocate General*) for the appellant referred to Rule 544, High Court Rules; *Wadia, Gandhy and Co.* v.

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Purshotam[1], *Staniar* v. *Evans*[2], *Luke* v. *South Kensington Hotel Company*[3], *Wiggins* v. *Peppin*[4], *In re Jones, a Solicitor*[5], *Brown* v. *Burdett*[6], *Farhall* v. *Farhall*[7], *Sayers* v. *Walond*[8].

Kirkpatrick, for the respondents.

JENKINS, C. J.:—We think the order under appeal is erroneous. Rule 544 of the Rules of the High Court of Bombay does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court, unless such order be by consent, and the Court has not, in our opinion, any inherent power on which the jurisdication can be rested: *Sayers* v. *Walond*[8].

The order, moreover, cannot be supported by reference to Rule 149 of the Supreme Court Rules, for, even if it be applicable, it provides for a procedure which has not been followed. We must, therefore, reverse the order with costs throughout.

Certify for Counsel.

Attorneys for the appellants:—*Messrs. Edgelow, Gulabchand, Wadia & Co.*

Attorneys for the respondents:—*Messrs. Crawford, Brown & Co.*

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(1) (1907) 32 Bom. 1.
(2) (1886) 34 Ch. D 470.
(3) (1879) 11 Ch. D. 121.
(4) (1837) 2 Beav 403.
(5) (1887) 36 Ch. D. 105.
(6) (1888) 40 Ch. D. 244.
(7) (1871) L. R. 7 Ch. 123.
(8) (1822) 1 Sim. & St. 97.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.
February 25.

BALVANT RAMCHANDRA NATU AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Judgment based upon an assumption or hypothesis subsequently ascertained to be erroneous—Re-opening the portion of the case affected by the error—Grant by Government of the revenue of a village as a unit of assessment—Cultivation by grantee of uncultivated or unassessed land—Grantee can do so and profit thereby.

The High Court on appeal delivered an interlocutory judgment remanding the case for a finding on a certain issue.

* First Appeal No. 163 of 1903.

On the case coming again before a differently constituted Bench of the High Court for final disposal,

Held, that the remanding judgment was conclusive on all points therein specifically decided beyond possibility of revision, but that it was otherwise with regard to any part of the judgment which could be shown to be based on such mistake or error as it would have been the duty of that Bench to correct, if it had been brought to its notice when the judgment was delivered

Per BATCHELOR, J.:—In so far as any part of the remand judgment is based on an assumption or hypothesis which is now ascertained to be erroneous, it is, we think, competent to us—or rather it is incumbent on us—to disregard it, and to re-open that part of the case affected by the error.

When Government grants the revenue of a village considered as a unit of assessment, and in course of time the grantee is able to bring under cultivation land which had previously been uncultivated or even unassessed, it is open to him under the grant to do so and to profit by the new cultivation.

APPEAL from the decision of A. Lucas, District Judge of Poona, in original Suit No. 2 of 1901.

The facts of the case are fully stated in I L. R. 29 Bom. 480.

The facts necessary for the purpose [of] this report were as follows:—

The British Government granted an annual cash allowance of Rs. 600 to Balaji Narayan Natu, forefather of the plaintiffs, for the expenses of a palanquin. This allowance was received by the plaintiffs' forefathers till 1831, when Government resolved that in lieu of the cash allowance they should be granted inam lands which they would select. The grantees thereupon selected the whole village of Wahagaon in Khed taluka and a piece of land at Poona termed "Ganjiche Wawar," and the Government granted the same in inam to them* Since then the grantees

* The material part of the sanad, Exhibit 34, dated the 29th August 1831, was as follows :—

To

Balaji Narayan Natu, Inamdar.

* * * * * * * * * * *

A Government order dated the 13th of the month of December in the Christian year 1830 was received to the effect that a land of six hundred rupees which you may select should be given to you for the Palkhi (palanquin) expense. Thereupon Moujo Wahagaon, Tarf Wada, Pargano Khed, and 'Ganjiche Wawar' near the City of Poona were selected and a communication was sent (to that effect) and on the 11th

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remained in enjoyment of the said land and the village from generation to generation, and the Government granted the land and the village to the family of the plaintiffs on the same tenure as other hereditary inams granted to them. The plaintiffs alleged that they and their forefathers had been in the enjoyment of the aforesaid piece of land and village as owners with all the proprietary rights appertaining thereto. They were also enjoying all forest produce, such as rab, grass, etc.

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of the month of April in the Christian year 1831 a Government order was received to the effect that both (*viz.*) the village and the Ganjiche Wawar should be given to you as Inam for the Palkhi expenses.

(I) having seen the Government order to the above effect, have been pleased to give you as Inam Mouje Walagaon * * and the Ganjiche Wawar at the City (these two) in all. The particulars in respect thereof are as given below :—

The amount given in respect of Mouje Wahagaon * * exclusive of Inamdars, Hakdars and village expenditure and officers.

The average for 10 years—		
Including remission	743 3-95	
Excluding remission	627 2 91	
According to the survey measurement—		
The amount of assessment of Khalsa lands together with the waste lands in the Fasli year 1240, including therein 'Mohotarfa' (*i.e.*, kind of taxes imposed on certain professions) and including the expenses	744-2-19½	
Assessment was taken agreeably to the survey for two years—		
The average thereof, including the remission ...	484-3-56½	
		575 1 29

Having in this manner seen the four amounts and having deducted the revenue of Ganjiche Wawar according to the survey measurement (and) as there is an order for six hundred rupees the amount that remains is fixed and given.

Ganjiche Wawar in the Peth Shukravar in the City of Poona ...	24-2 1
	600 0-0

Altogether two places are given to you as Inam by the order of the Government. You will therefore together with your sons, grandsons, etc., from generation to generation enjoy the village and the Ganjiche Wawar and live in peace. A communication has been sent to England. Whether to confirm this sanad or not depends upon the will of the Court of Directors.

On the 29th July 1897 the Government of Bombay published in the *Bombay Government Gazette* a notification that Survey No. 125, measuring 648 acres, situated in Wahagaon village was to form part of the reserved forest from the 1st October 1897.

The plaintiffs thereupon filed the present suit against the Secretary of State for India in Council to obtain (1) a declaration that "they have a proprietary right over Survey No. 125" situated in the Wahagaon village and for possession of the same; (2) for an injunction restraining the defendant from obstructing plaintiffs from the enjoyment of the land as proprietors and from cutting rab, etc.; and (3) for other incidental relief.

The defendant by his written statement contended *inter alia* that the proprietary rights in the land in suit belonged to Government and not to plaintiffs, who were merely grantees of land revenue; that the plaintiffs having been entitled only to revenue and not to the soil of the village, could not by long user or enjoyment become the proprietors of the soil and of timber or forest rights, and that the action of Government in constituting the land a reserved forest and placing it under restrictions attaching to such forest was, under the Forest Act (VII of 1871), one that might legally be done by Government, and the Civil Court had no power to interfere with the exercise by the Government of its discretion in the discharge of its functions.

The Judge found *inter alia* that the plaintiffs were only grantees of land revenue and were not proprietors of the land; that they were not entitled as owners to cut rab and enjoy the land as full proprietors, and that the action of Government in constituting the plaint land a reserved forest and placing it under restrictions attaching to such forest was legal under the Forest Act. He therefore held that the plaintiffs were not entitled to the relief sought and dismissed the suit.

The plaintiffs appealed against this decision to the High Court and the defendant also filed cross-objections.

Branson with *K. H. Kelkar* for the appellants (plaintiffs).

Raikes (Acting Advocate-General) with *Rao Bahadur V. J. Kirtikar* (Government Pleader) for the respondent.

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BALVANT RAMCHANDRA v. SECRETARY OF STATE.

The appeal was heard by a Division Bench composed of Russell and Batty, JJ., who sent down the following issue for trial: *see* I. L. R. 29 Bom. 513: —

"Whether the land in dispute is comprised within the area to which the grant extends or formed part of the unassessed waste excluded from its operation."

The finding of the Judge (C. A. Kincaid) on the said issue was that the land in dispute was included in the grant to the Inamdar.

The respondent (defendant) preferred cross-objections.

K. H. Kelkar for the appellants (plaintiffs).

Raikes (Acting Advocate-General) with *M. B. Chaubal* (Government Pleader) for the respondent (defendant).

BATCHELOR, J.:—The course of this litigation is described in *Balvant Ramchandra* v. *Secretary of State*[1]. The case then came on appeal before a Division Bench, consisting of Russell and Batty, JJ., who after a long judgment dealing with various points sent down for trial the issue whether the land in dispute was comprised within the area to which the grant extended or formed part of the unassessed waste excluded from the grant.

The District Court has returned a finding that the land in dispute was included in the grant to the Inamdar.

The case again came before the same Bench, when it was directed to stand over for one month to afford the defendant an opportunity of producing evidence, if he so desired, in rebuttal of that which had already been adduced by the plaintiffs on the subject of possession.

The defendant did not avail himself of this opportunity, and so the appeal now comes for final disposal before the present Bench. The only question before us is whether, having regard to the grant, the Government of Bombay are entitled to declare the land in dispute a reserved forest under section 5 of the Forest Act: all other points have been decided by Russell and Batty, JJ., and they have not been discussed before us.

In our opinion the question lying at the threshold of our inquiry turns upon the effect to be given to the remanding judgment of

[1] (1905) 29 Bom. 480.

the Bench in *Balvant Ramchandra* v. *Secretary of State*[1]. That judgment is, no doubt, binding upon us *quoad* all points which are therein specifically decided beyond possibility of revision. But it would, we think, be otherwise in regard to any part of the judgment which can be shown to be grounded on such mistake or error as it would have been the duty of that Bench to correct, if it had been brought to notice when the judgment was delivered. In so far as any part of the judgment is based upon an assumption or hypothesis which is now ascertained to be erroneous, it is, we think, competent to us—or rather, it is incumbent on us—to disregard it, and to reopen that portion of the case affected by the error. Now upon the best consideration that we can give to the matter, and after carefully weighing all that has been urged by Mr. Raikes, we must adhere to the opinion, which we formed at an early stage of the hearing, that that part of the former judgment which led to the issue whether the land in suit *was unassessed waste at the time of the grant, is grounded* upon a mistaken hypothesis which should now be discarded. The point is dealt with in the concluding pages of the reported judgment, where the learned Judge speaks of certain land as being excluded, not only *from* the grant, but *in* the grant. This land is variously described as waste, or uncultivable waste, or unassessed waste, as if these terms were interchangeable, which we venture to think they are not; but having regard to the reasoning as a whole and to the form of the issue sent down, we apprehend that the exact distinction upon which the learned Judge decided to insist was the distinction between land which was unassessed waste at the time of the grant and land which was not. This view is accepted by Counsel for the Secretary of State, and is borne out by Counsel's notes of the arguments before the Division Bench. From what source, then, did the learned Judge obtain the distinction in question? There can be no doubt that he was under the impression that it was derivable from the terms of the grant itself; that is the origin to which he ascribes it. No reference is made to the general law in support of the distinction, nor, indeed, was any such support available, for since Melville, J.'s judgment in 1882, the law in this Presidency

(1) (1905) 29 Bom. 480

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BALVANT RAMCHANDRA v. SECRETARY OF STATE.

has always been that a grantee of the revenue is entitled to make such profit as he can out of unoccupied lands: see *Ramchandra* v. *Venkatrao*[1] followed in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*[2] and *Rajya* v. *Balkrishna Gangadhar*[3]. But if we turn to the grant itself, Exhibit 34, we find no countenance for the distinction in question: what is there given is "the village," that is, we take it, the entire village, and in the description following the grant "waste lands" are expressly included. Indeed upon a careful reading of the material part of Batty, J.'s judgment at page 513 of the report it is clear that he was throughout confusing the grant, Exhibit 34, with Exhibit 35, the revenue account of the village for the year 1828-29 when it first fell under the operation of Pringle's survey. It was a mere oversight occurring at the end of a long and exhaustive judgment; and we must, we think, begin our decision of the appeal by removing this misconception and its consequences. This course is facilitated by the remark made by the same Bench in their interlocutory judgment on the second remand, the remark, namely, that in the former judgment "it was not intended to suggest that the parties could either of them claim to have obtained a decision in any measure disposing of questions which they respectively have to meet."

It follows, then, that we must consider the construction of the grant as *res integra* upon the point now under discussion, and, that being so, we cannot entertain any doubt as to what our decision should be. That the grant is merely a grant of revenue, has been decided, and that decision is binding upon us; but, with that exception, we can see no reason for imposing any restriction on its operation. The "village" is given to the grantee; no limits or boundaries are stated; and, as we have said, waste lands are expressly included. The only rights excluded are apparently those of Inamdars, Hakdars and village officers, and these are expressed to be excluded. The statement of average revenue following the grant should, we think, be read as mere description, and cannot be taken to limit the universality of the grant to lands then actually assessed. What the

(1) (1882) 6 Bom. 598 at p. 6[illegible]9.
(2) (1895) 20 Bom. 112.
(3) (1905) 29 Bom. 415.

Government granted was, we think, the revenue of the village considered as a unit of assessment, and if, in the course of time, the grantee was able to bring under cultivation land which had previously been uncultivated or even unassessed, it was open to him under the grant to do so and to profit by the new cultivation. This view receives support from the contemporary correspondence between the officers of the Government, and we may point to Mr. Giborne's letter of 13th March 1831 to the Secretary to the Government of Bombay as plainly contemplating the expansion of the cultivated area. And, as we have noticed, this construction involves no new doctrine, but is consistent with what has been the law of this Presidency since 1882.

For these reasons we are of opinion that the land in suit cannot be excluded from the grant upon the only ground on which it is sought to exclude it, namely, as having been unassessed waste at the time of the grant and that the right to the revenue arising from it must be held to have passed to the grantee under the grant.

This being so, it is not disputed that the Government was not entitled to take up the land in suit for reserved forest, and therefore we accept this proposition as a consequence which needs no further discussion.

Though this is enough to dispose of the case, we may add that in our opinion the appeal ought to be allowed even apart from the terms of the grant. The Government has sought to support the decree upon the ground that the land in suit is identifiable as the 3¼ *khandies* ½ *maund* of *gairan dungar* (that is pasture, hill land) of which the mention occurs in the village records between 1822 and 1829. The argument is that as that land was unassessed waste, it should be held to have been excluded from the grant under the judgment of Russell and Batty, JJ. Thus the position depends upon identifying the land in suit with the 3¼ *khandies* ½ *maund* of the records. Mr. Kincaid, the District Judge, to whom on the remand this argument was addressed, has found that the attempted identification failed; and we are of the same opinion. It is unnecessary to elaborate this part of the case, but we will state very succinctly some of the reasons

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which have led us to this opinion. In the first place, the words "*gairan dungar*" are not words descriptive of a certain parcel of land, but are words of enumeration, corresponding to the English expression "pasture land, hill land," the phrases being separated by a comma. Then 3¼ *khandies* ½ *maund* cannot by any possibility be reckoned as the equivalent of 618 acres, the admitted area of the land in suit, but amount only to about one half of this area. Moreover, statements in the earlier records from 1822 onwards are of no real assistance; what must be looked to is the state of the land at the time of the grant. At that time the village was subject to Pringle's survey of 1828-29 and in Exhibit 85 we have the statement of revenue for that year. There we find that the 3¼ *khandies* ½ *maund* of the earlier records has disappeared, and the only uncultivable land is entered as 202 acres and a fraction. Deducting various strips of waste appertaining to different survey numbers, the total area assigned to "pastures, rocky plains, etc.," is only 28 acres odd, and it is out of the question that this should represent the land in suit. To escape this difficulty Counsel for the Secretary of State is driven to suggest that the whole of the 618 acres in suit was somehow omitted from Pringle's survey, but that is a somewhat violent assumption and in our opinion ought not to be made. It is not as if Pringle had omitted to reckon pastures and rocky lands; he *has* surveyed them, and the result is his figure of 28 acres, and this figure leaves no room for the 618 acres in suit. Thus it seems clear from the survey that at the time this grant was made, the land in suit was not unassessed waste; it would, therefore, pass to the grantee even under the terms of Batty, J.'s judgment. It may be added that both Mr. Silcock, the Collector, and Mr. Shuttleworth, the Conservator of Forests, also formed the opinion that the land was assessed at the time of the grant; and it seems to us that the District Judge, Mr. Kincaid, was fully justified in animadverting upon the various and different positions which the defendant elected to adopt at one time or another in the course of this litigation. But this part of the case need not be pursued further: for the above reasons we are of opinion that the appeal would succeed even on the footing of the judgment of the Division Bench.

The result is that the decree under appeal must be reversed, and we give the plaintiffs a declaration that though they have no proprietary rights as owners over the land in suit, the defendant had no authority to issue the order including this property in the Government reserved forest, and the plaintiffs are entitled to continue to enjoy the land in the same way as before the order to afforest.

It is not necessary to consider the question of granting the injunctions asked for by the plaintiffs against the Secretary of State as the Government through its pleader has given an undertaking not to obstruct the plaintiffs' enjoyment of the land in question so long as this decree remains unreversed or unmodified and so long as the land is not acquired.

Under the provisions of section 420, Civil Procedure Code, we give the defendant a period of three months within which to satisfy the decree.

The undertaking of the Government will not bar it from the the exercise of any other power vested in it for the control of such land under the Indian Forest Act, 1878, or otherwise.

The appellant will have ¾ths of his costs throughout from the respondent.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Beaman.

1908. *March 11.*

KHASHABA BIN MANSING (ORIGINAL DEFENDANT), APPELLANT, v. CHANDRABHAGABAI, WIFE OF BALVANTRAV KHASHABA (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), sections 122 and 123—Gift of immoveable property—Acceptance of the gift—Registration of the deed subsequent to acceptance—Remand—Examination of witness on commission—Practice.

A gift of immoveable property duly made and accepted is not invalid merely because the registration of the deed of gift took place after the death of the donor.

* Second Appeal No. 277 of 1905.

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BHAGABAI.

Nand Kishore Lal v. *Suraj Prasad*(1), followed.

On registration the deed of gift would operate as from the date of execution.

On remand by the High Court for the determination of certain issues the District Court sent down the case to the first Court in order that the evidence might be taken then. The evidence of the plaintiff was taken on commission.

Held, that the defendant was in no wise aggrieved by the procedure followed.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khándesh, confirming the decree of V. N. Rahurkar, Subordinate Judge of Bhusával.

The plaintiff sued to recover possession of certain lands with mesne profits, alleging that the lands in dispute along with other lands belonged to her grandfather-in-law Mansing; that on the 2nd December 1890 he made a gift of them to her under a deed and put her in possession; and that she was illegally dispossessed of the lands in dispute by the defendant, who was her father-in-law, in June 1900.

The defendant denied the execution of the deed of gift by his father Mansing and contended that his father could not make a gift of the lands as they were joint property of himself and his father; that his father could not make a gift of his entire immoveable property; that the gift was invalid according to Hindu Law and the Transfer of Property Act (IV of 1882); that the plaintiff was not put in possession; and that she was not entitled to possession and mesne profits.

The Subordinate Judge found that the deed of gift was proved; that the plaint lands were the self-acquisition of Mansing and they were not the joint property of defendant and Mansing; that the gift to plaintiff was not invalid; and that the plaintiff was entitled to get possession and mesne profits the amount of which should be determined in execution.

On appeal by the defendant the Judge confirmed the decree.

The plaintiff preferred a second appeal which was heard by Jenkins, C. J., and Aston, J., on the 31st January 1906 when the following interlocutory judgment was recorded:—

(1) (1898) 20 All. 202.

Interlocutory Judgment.—To perfect a gift there must be an acceptance by the donee.

In this case there is no definite finding of an acceptance by the donee.

It is argued on behalf of the donee that this was assumed in her favour by the lower Courts, but that is not sufficient.

It was necessary for the donee to establish acceptance, and for the Court definitely to find on that acceptance in the affirmative. We cannot satisfactorily deal with the case until this point is cleared up.

We therefore send back the case for the determination of the following issues:—

1. Was the gift alleged by the plaintiff accepted by her or on her behalf?

2. If so, was it accepted during the life-time of Mansing or subsequently?

Parties will be at liberty to adduce further evidence and the return should be in two months.

On the remand the District Judge sent down the case to the Subordinate Judge for taking further evidence and to certify his findings on the issues raised by the High Court, and it was during the remand proceedings that the plaintiff, who was not examined in the case before, was examined on commission.

On the said issues the Subordinate Judge (R. D. Nagarkar) found,

1. In the affirmative.

2. It was so accepted not during the life-time of Mansing but subsequently.

The findings of the District Judge on the said issues were:—

1, 2. The plaintiff accepted the gift during Mansing's life-time by accepting the delivery of the deed of gift through her husband.

The defendant preferred objections to the findings of the District Judge.

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Raikes (with *S. V. Bhandarkar*) for appellant (defendant).

M. B. Chaubal (Government Pleader with *M. V. Bhat*) for respondent (plaintiff).

BATCHELOR, J.:—The first point taken in this appeal is a point of law and depends upon the argument that under sections 122 and 123 of the Transfer of Property Act, there can be no good acceptance of a gift of immoveable property until the transfer has been effected by a registered instrument as required by the law. It seems to matter little whether the acceptance required is the acceptance of the gift or of the transfer. For as we understand the argument there is neither gift nor transfer until the transaction is embodied in a registered instrument.

Now the facts of this case show that although there was an acceptance by the plaintiff during the life-time of the donor, this acceptance occurred while yet the instrument of gift remained unregistered. We are, therefore, asked to say that there has been no valid acceptance.

But the precise point occurred in the case of *Nand Kishore Lal* v. *Suraj Prasad*[1], where it was held that the gift of immoveable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor, and we are of opinion that we ought to follow that decision.

It must be remembered moreover that here the doner had done all that it was required of him to do in order to make the gift, and the subsequent registration could have been effected without any co-operation on his part. Further, the deed of gift was registered afterwards, and on registration it operated as from the date of execution; and this, we think, is an answer to the technical objection that there was no acceptance of a registered instrument.

The only other point urged was as to the matter of procedure, and it was said that the defendant had been prejudiced by the circumstance that the plaintiff who had never tendered herself for examination throughout the course of the case, was allowed, when the matter came before the District Judge on the remand,

(1) (1898) 20 All. 392.

to be examined on commission. It is said, therefore, that the result is that the defendant is concluded in this appeal by the evidence of a witness whom no Judge has ever seen. However that may be, it has been the invariable practice of these Courts that when a remand of this nature is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interests of the parties themselves and for their convenience. But nevertheless the lower appellate Court still remains empowered by the order of remand to take what evidence it may see fit to take, and record its findings upon it.

We are of opinion, therefore, that the defendant has no just grievance in the matter of the course which this remand has taken.

The result is that the decree of the lower Court will be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1908. *March 23.*

SHANKAR SHAMRAO (ORIGINAL DEFENDANT 1), APPELLANT, v. SHANKARGAUDAYA BIN BASALINGANGAUDA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B, clauses (1) and (2) [1]*—Decree on Mortgage—Payment by instalments—Sale on default in payment of an instalment—Application to make the decree absolute—Extension of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for payment by instalments.*

The Court of the First Class Subordinate Judge of Dhárwár passed a decree on a mortgage which directed payment of the debt by instalments and on

*Appeal No. 192 of 1907

[1] Section 15B, clauses (1) and (2) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), runs thus —

15B. Power to order payment by instalments in case of decree for redemption, foreclosure or sale :—(1) The Court may in its discretion, in passing a decree

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Raikes (with *S. V. Bhandarkar*) for appellant (defendant).

M. B. Chaubal (Government Pleader with *M. V. Bhat*) for respondent (plaintiff).

BATCHELOR, J.:—The first point taken in this appeal is a point of law and depends upon the argument that under sections 122 and 123 of the Transfer of Property Act, there can be no good acceptance of a gift of immoveable property until the transfer has been effected by a registered instrument as required by the law. It seems to matter little whether the acceptance required is the acceptance of the gift or of the transfer. For as we understand the argument there is neither gift nor transfer until the transaction is embodied in a registered instrument.

Now the facts of this case show that although there was an acceptance by the plaintiff during the life-time of the donor, this acceptance occurred while yet the instrument of gift remained unregistered. We are, therefore, asked to say that there has been no valid acceptance.

But the precise point occurred in the case of *Nand Kishore Lal* v. *Suraj Prasad*[1], where it was held that the gift of immoveable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor, and we are of opinion that we ought to follow that decision.

It must be remembered moreover that here the doner had done all that it was required of him to do in order to make the gift, and the subsequent registration could have been effected without any co-operation on his part. Further, the deed of gift was registered afterwards, and on registration it operated as from the date of execution; and this, we think, is an answer to the technical objection that there was no acceptance of a registered instrument.

The only other point urged was as to the matter of procedure, and it was said that the defendant had been prejudiced by the circumstance that the plaintiff who had never tendered herself for examination throughout the course of the case, was allowed, when the matter came before the District Judge on the remand,

(1) (1898) 20 All. 302.

to be examined on commission. It is said, therefore, that the result is that the defendant is concluded in this appeal by the evidence of a witness whom no Judge has ever seen. However that may be, it has been the invariable practice of these Courts that when a remand of this nature is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interests of the parties themselves and for their convenience But nevertheless the lower appellate Court still remains empowered by the order of remand to take what evidence it may see fit to take, and record its findings upon it.

We are of opinion, therefore, that the defendant has no just grievance in the matter of the course which this remand has taken.

The result is that the decree of the lower Court will be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton

1908 *March 23.*

SHANKAR SHAMRAO (ORIGINAL DEFENDANT 1), APPELLANT, v. SHANKARGAUDAYA BIN BASALINGANGAUDA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15B, clauses (1) and (2) [1]—Decree on Mortgage—Payment by instalments—Sale on default in payment of an instalment—Application to make the decree absolute—Extension of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for payment by instalments.

The Court of the First Class Subordinate Judge of Dhárwár passed a decree on a mortgage which directed payment of the debt by instalments and on

*Appeal No 192 of 1907

(1) Section 15B, clauses (1) and (2) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), runs thus —

15B. Power to order payment by instalments in case of decree for redemption, foreclosure or sale :—(1) The Court may in its discretion, in passing a decree

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default of the payment of an instalment the debt to be recovered by the sale of the mortgaged property.

The judgment-debtor having failed to pay an instalment the decree-holder applied for the decree to be made absolute. In the meanwhile the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Dhárwár District and the judgment-debtor having thereupon applied for instalments under section 15B of the Act,

Held, that there is nothing in section 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to warrant the view that the legislature intended that when a decree allowing instalments had already been obtained, the whole matter should be re-considered afresh in execution with a view to substitute some new scheme of instalments.

Held further, that the second clause of section 15B refers only to those cases where directions for payment have already been given under the first clause of that section.

APPEAL against an order passed by R. G. Bhadbhade, First Class Subordinate Judge of Dhárwár, making absolute a decree for sale of mortgaged property.

On the 17th December 1903 the plaintiff obtained against the defendants a decree on a mortgage in the Court of the First Class Subordinate Judge of Dhárwár. The decree was made by R. R. Gangoli, First Class Subordinate Judge, in the following terms:—

The plaintiff should recover the claim Rs 6,548 and Court costs and also future interest by three equal instalments as mentioned below.

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for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3, clause (y) or clause (z), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realisation of that sum.

1. Rupees 2,183 and one-third of the costs and interest from the date of the institution of the suit up to the 30th March 1904 A. D., or up to the payment of the money at the rate of six per cent. per annum on Rs. 4,000 should be paid to the plaintiff by the defendant No. 1 on the 31st March 1904 A. D., or before that date.

2. Rupees 2,183 and one-third costs and interest from the 1st of April 1904 A. D., up to the 31st March 1905 A. D., or till payment of money at the rate mentioned above on Rs 2,000 should be paid on the 31st of March 1905 A. D., or before that date.

3. Rupees 2,182 and one-third costs should be paid on the 31st of March 1906 A. D., or before that date. If default be made in the payment of any instalment and if the defendants Nos 3 and 4 should not pay the money to the plaintiff and redeem the property the plaintiff to cause the property in mortgage to be sold and recover the said money with interest and costs also. The defendant No. 1 to pay the costs of the defendants Nos 3 and 4 and bear his own costs. If the other property be not sufficient (to pay the plaintiff's money) the property given in mortgage to the defendant No. 3 should (also) be sold.

Costs of the Suit.

* * * *

Owing to failure to comply with the provisions of the decree, the plaintiff applied that the decree should be made absolute. In the meanwhile the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Dhárwár District and defendant 1 taking advantage of such extension applied that the decretal amount be made payable by instalments under the provisions of section 15B of the Act. The First Class Subordinate Judge (R. G. Bhadbhade) found that defendant 1 was an agriculturist and passed the following order:—

Order

The plaintiff has described defendant 1 as a writer but on examining defendant 1 I think his profession is that of agriculture. As to 1st defendant's prayer for instalments I cannot grant it because the decree itself allowed three instalments—further some of the lands mortgaged to plaintiff appear to be in possession of defendants 3, 4, who are not agriculturists.

Execution to be transferred to the Collector. Decree for sale made absolute.

Against the said order defendant 1 preferred an appeal.

K. H. Kelkar for the appellant (defendant 1).

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SHANKAR SHAMRAO v. SHANKAR-GAUDAYA.

S. R. Bakhle for respondents 1 and 2 (heirs and legal representatives of plaintiff).

BATCHELOR, J.:—The appellant here is the judgment-debtor-mortgagor, and the decree had been obtained against him before the introduction of the Dekkhan Agriculturists' Relief Act into the Dhárwár District.

That decree provided for payment of the mortgage-debt in three instalments, and it was ordered that if default were made in the payment of any instalment, then the mortgagee was to be empowered to bring the property to sale.

Default having been made, an application was presented by the mortgagee for the sale of the property. This application was granted by the First Class Subordinate Judge at Dhárwár.

In appealing from that order the judgment-debtor has taken two points before us. In the first place it was said that inasmuch as the Dekkhan Agriculturists' Relief Act had been extended to the Dhárwár District when this application in execution came before the Subordinate Judge, he should have re-considered the whole matter under section 15B of the Dekkhan Agriculturists' Relief Act and should have passed such order as to instalments as to him seemed fit. But there is nothing in section 15B to warrant the view that the legislature intended that where a decree allowing instalments had already been obtained, the whole matter should be re-considered afresh by another Court, with a view to the substitution of some new scheme of instalments, and we do not think that this was intended. Secondly, it was urged that the lower Court's order deprived the mortgagor of the benefit which he might have obtained under the second clause of section 15B. But, in our opinion the second clause refers only to those cases where directions for payment have already been given under the first clause, and that is not the case here.

We must, therefore, confirm the order under appeal and dismiss this appeal with costs.

Order confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

LAXMANLAL KANAKKIRTI PANDIT (ORIGINAL DEFENDANT), APPELLANT, *v.* MULSHANKAR PITAMBARDAS VYAS (ORIGINAL PLAINTIFF), RESPONDENT.*

1908. *April* 1.

Contract Act (IX of 1872), section 21—Criminal Procedure Code (Act V of 1898), section 513—Criminal prosecution—Bail for appearance—Nominal sale-deed and rent-note passed to indemnify bail—Suit for recovery of rent—Sale-deed void as opposed to public policy—Rent-note and sale-deed part and parcel of same transaction—Rent-note void.

While a criminal prosecution was pending against the defendant his pleader entered into a bail bond for his appearance. To indemnify the pleader against any loss which he might suffer under the bail bond, a nominal sale-deed and a nominal rent-note were passed by the defendant to the plaintiff.

The plaintiff having subsequently brought a suit to recover two years' rent with interest on the strength of the rent-note the defendant met the claim by a denial that the property belonged to the plaintiff.

Held, dismissing the suit that the consideration for the sale-deed was opposed to public policy The sale-deed was therefore void under section 24 of the Contract Act (IX of 1872)

Herman v. *Jeuchner*[1] referred to.

Held, further, that as the sale-deed and rent-note, which latter was merely intended to secure interest on the principal sum, were part and parcel of one single transaction, the rent-note was tainted with the same illegality which affected the sale-deed and was therefore also void.

Part of a single consideration for one object being unlawful, the whole agreement is void under section 24 of the Contract Act (IX of 1872).

SECOND appeal from the decision of R. Knight, District Judge of Ahmedabad, reversing the decree of N. V. Samant, Additional Joint Subordinate Judge of Ahmedabad.

The plaintiff sued to recover two years' rent of certain houses and interest alleging that the houses originally belonged to the defendant who sold them to the plaintiff for Rs. 8,000 under a deed, dated the 5th October 1901, and was continued in possession as a tenant under a rent-note passed on the same day.

* Second Appeal No. 279 of 1907.

(1) (1885) 15 Q. B. D. 561.

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LAXMANLAL v. MULSHANKAR.

The defendant denied the plaintiff's ownership and stated as follows:—A criminal prosecution was launched against him and he had to give security for his appearance in the Criminal Court. His pleader Laxmishankar stood surety for him. In order to ensure the safety of Laxmishankar, the defendant passed a sale-deed and a rent-note to the plaintiff who was Laxmishankar's near relation and in whom the defendant had confidence. He was subsequently discharged from the criminal prosecution and the bail bond passed by Laxmishankar was consequently cancelled. The plaintiff was never put in possession. There was no consideration for the sale-deed and that deed as well as the rent-note were void. The plaintiff had brought a suit against the defendant in the Court of Small Causes at Ahmedabad for the recovery of rent, but that Court dismissed the suit Subsequently the plaintiff brought a possessory suit in the Mámlatdár's Court but that suit also was dismissed.

The Subordinate Judge found that the sale set up by the plaintiff was a mortgage by conditional sale, that the consideration for it was Rs. 3,000, that the rent-note was a nominal transaction and that the defendant did not occupy the premises as plaintiff's tenant. He therefore dismissed the suit with costs and directed the defendant to bear his own costs.

On appeal by the plaintiff the District Judge held that under section 92 of the Evidence Act (I of 1872), it was not competent to the defendant to adduce evidence of a contemporaneous oral agreement varying the terms of the sale-deed. He therefore reversed the decree and allowed the claim but directed the plaintiff to bear costs throughout.

The defendant preferred a second appeal and the plaintiff presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

G. S. Rao for the appellant (defendant).

Branson (with *T. R. Desai*) for the respondent (plaintiff).

The appeal was argued on the 17th July 1907 before a Division Bench composed of Chandavarkar and Heaton JJ., who agreed with the District Judge that parol evidence was not

admissible to prove a contemporaneous oral agreement varying the terms of the deed, but relying on the maxim *ex turpi causa non oritur actio* sent down the following issues for trial:—

"(1) Did the defendant execute the sale-deed, Exhibit 49, and the rent-note for the purpose and consideration mentioned in his written statement, *viz.*, 'to ensure the safety of Laxmishankar for his having stood bail' and for further advances?

(2) If the first issue is found in the affirmative, did defendant execute the sale-deed and the rent-note in the name of the plaintiff at Laxmishankar's request and did plaintiff take the deed in his name with knowledge of the said consideration and purpose and merely for Laxmishankar's accommodation?

(3) Whether both the sale-deed and the rent-note or either are or is wholly or partially void or illegal?

(4) Did the defendant receive moneys or other benefit under the sale-deed and is he entitled to be relieved from it upon any and what condition?

(5) Is the defendant estopped from contending that the transactions represented by the sale-deed and rent-note are illegal?

Parties are at liberty to give evidence on these issues. Findings to be returned within four months."

The District Judge (Dayaram Gidumal) sent the case down to the Subordinate Judge to record additional evidence and to certify his findings on the said issues. The findings of the Subordinate Judge (Chimanlal Lallubhai) were to the following effect.—

(1) In the affirmative.

(2) In the affirmative.

(3) Both the sale-deed and rent-note were wholly illegal.

(4) The defendant received Rs. 912-4-0 under the sale-deed and he was entitled to be relieved from it on payment of the said sum with interest at the rate agreed but not in the present suit.

(5) In the negative.

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The District Judge recorded the following findings:—

(1) In the affirmative.

(2) The documents were executed at Laxmishankar's request and plaintiff took the sale-deed in his name with knowledge of the said consideration and purpose. But he did not take the deed *merely* for Laxmishankar's accommodation. He took it for Laxmishankar's accommodation to the extent of Rs. 5,000.

(3) The documents were wholly illegal (section 24 of the Contract Act).

(4) The defendant did receive moneys under the sale-deed. He was entitled to be relieved from the deed, but was bound to pay back (in a suit properly framed for the purpose) the money received with interest (section 65 of the Contract Act). The present suit was, however, not based on the sale-deed but upon the rent-note. It was also not for money had and received. Hence it was not necessary to determine the precise amount received. The suit being for rent the necessary materials for such determination had not been placed before the Court.

(5) In the negative.

The plaintiff preferred objections against the said findings.

G. S. Rao for the appellant (defendant).

G. K. Parekh for the respondent (plaintiff).

BATCHELOR, J.:—This was a suit for rent claimed by the plaintiff for a period of two years with interest. The claim was met by a denial that the property belonged to the plaintiff, and the defendant explained that, while a criminal prosecution was hanging over his head his pleader Laxmishankar stood bail for his appearance in the Criminal Court; and that to indemnify Laxmishankar against any loss which he as bail might suffer, a nominal sale-deed and a nominal rent-note were passed to Laxmishankar's relative, the plaintiff.

Various issues were raised and decided and ultimately in July 1907, the case came before a Divisional Bench of this Court and an interlocutory judgment was delivered remanding the case back for a trial of certain issues which had arisen. The District Judge's findings upon these issues have now been

returned to us, and for present purposes it will be sufficient to notice three of these findings; they are :—

(1) That the defendant executed the sale-deed, Exhibit 49, and the rent-note to ensure the safety of Laxmishankar against any loss which he might suffer under his bail bond and for further advances.

(2) That the defendant executed the sale-deed and the rent-note in the name of the plaintiff at Laxmishankar's request, and the plaintiff took the deed in his name with knowledge of the said consideration and purpose.

(3) That both the sale-deed and the rent-note are void and illegal.

Now it will be seen that the first two findings from which the third finding is merely an inference, are findings of fact which neither can be nor have been questioned before us. We must assume the correctness of these findings of fact, and upon that assumption it appears to us clear that the legal consequence follows that the sale-deed and the rent-note upon which this suit is based are void. The Hon'ble Mr. Gokuldas in endeavouring to avoid this conclusion has suggested that the English law as laid down in *Herman* v. *Jeuchner* [1] is not the law in India, inasmuch as under section 513 of the Criminal Procedure Code, when a person is required to execute a bond with or without sureties, the Court may in most cases permit him to deposit a sum of money in lieu of executing such bond; and this provision Mr. Gokuldas suggests, indicates that the policy of the English law as expounded in *Herman* v. *Jeuchner* [1] has been abandoned by the legislature in India. But it appears to us that no such inference can properly be drawn from section 513, for, the deposit there allowed is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes.

Moreover the fact here is that Laxmishankar, the surety, bound himself by a bond to answer for the defendant's appearance, and then endeavoured by obtaining this indemnity to deprive the public of the security afforded by the bond. Although, no doubt, public policy as Lord Davey has observed is always an unsafe and treacherous ground for legal decision (*Janson* v. *Driefontein Consolidated Mines, Limited*)[2], yet, here this definite

(1) (1885) 15 Q. B. D. 561. (2) [1902] A. C. 484 at p. 500.

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principle of public policy has been admitted in England and depends upon considerations affecting the administration of public justice, which have certainly not less force in India than they have in England. We think, therefore, that under section 23 of the Contract Act we are bound to regard the consideration of this agreement as opposed to public policy and to hold that the agreement is in consequence void.

Then it was said, that whatever illegality might attach to the sale-deed, yet the rent-note was a separate transaction and the suit under the rent-note ought not therefore to suffer. But the sale deed and the rent-note were part and parcel of one single transaction, and though indeed the document is spoken of as a rent-note, yet it appears that its real object was to secure interest on the principal sum. We have no doubt, therefore, that the rent-note is tainted with the same illegality which affects the sale-deed, and cannot stand on any separate footing.

Next it was urged that the defendant was estopped under section 116 of the Evidence Act from pleading the true facts, inasmuch as he was a tenant of the plaintiff. But this, it seems to us, begs the whole question which is simply whether there was a valid tenancy or not.

Finally, it was urged that even if part of the consideration for the rent-note failed, yet part of it should be held not to fail, and to the extent of the part held good relief should be allowed to the plaintiff in this suit. It is, however, clear to us that the agreement was an indivisible agreement. Part of a single consideration for one object was unlawful, and therefore the whole agreement is void under section 24 of the Contract Act. As was said by Mr. Justice Chitty in *Baker* v. *Hedgecock* (1), it is not possible for the Court to "create or carve out a new covenant for the sake of validating an instrument which would otherwise be void". The suit is a suit for rent, and is based upon a rent-note which is void.

It follows that the suit must be dismissed and no relief can be awarded to the plaintiff. As to whether the defendant, if the plaintiff seeks to enforce the sale-deed, should be put upon any,

(1) (1888) 39 Ch. D. 520 at p. 523.

and if so what terms, that is a matter which does not arise before us now, but which will be considered at the proper time and place if the question is agitated. The result is that the District Judge's decree must be reversed and the decree of the Court of first instance must be restored. Costs throughout on the plaintiff except as to the defendant's costs in the Court of first instance which he himself will bear.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1908.
April 14.

PAWADEWA KOM CHANBASAPPA MULLAH AND ANOTHER (ORIGINAL DEFENDANTS Nos. 1 AND 2), APPELLANTS, v. VENKATESH HANMANT KULKARNI AND OTHERS (ORIGINAL PLAINTIFFS 1 AND 2, AND DEFENDANTS 3 AND 4), RESPONDENTS.*

Hindu law—Inheritance—Exclusion from inheritance—Deaf and dumb son—Vesting of the estate in the widow of the last male holder—Subsequent birth of a son to one of the disqualified sons—Divesting of estate.

M, a Hindu, died leaving him surviving a widow and three sons C. and two others, all of whom were born deaf and dumb. His widow succeeded to the estate, the sons being disqualified from inheriting. Later on C. married and a son was born to him. The widow thereafter sold the property to plaintiffs who now sued to recover possession from the wife and son of C. It was contended for the defendants that the widow succeeding to her husband, took only a widow's estate and that that estate was divested by the after-born son of C.

Held, that the plaintiffs were entitled to succeed. That in fact and in contemplation of law C.'s son had no existence when the estate vested in the widow; and his subsequent birth could not divest the estate.

Held, further, that C.'s son stood in no better position than would have been occupied by his father C. if the latter's disqualification had been removed after the widow had succeeded to the inheritance; and in that case, the widow's title would prevail inasmuch as it was superior to C.'s [illegible] endured.

* Second Appeal No. 530 of 1907.

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PAWADEWA v. VENKATESH.

SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwár, reversing the decree passed by V. V. Kalyanpurkar, Subordinate Judge of Gadag.

Suit to recover possession of property.

The property belonged originally to one Malam, who died leaving a widow Bandeva and three sons, all of whom were born deaf and dumb. Bandeva succeeded to the property.

One of the disqualified sons Chanbasappa then married, and a son (defendant 2) was born to him.

After the birth of defendant 2, Bandeva sold the property to plaintiffs.

The plaintiffs brought a suit to recover possession of the property from the wife and son of Chanbasappa (defendants 1 and 2).

The Subordinate Judge held that Bandeva had no authority to execute the sale and that it was not binding on defendant 2. He, therefore, dismissed the suit.

This decree was on appeal reversed by the District Judge, who, in the course of his judgment, remarked as follows:—

"Though Chanbasappa's congenital infirmity was merely a personal disqualification and was not shared by his son defendant No. 2 (Mayne's Hindu Law, 7th Edn., p. 811) still defendant No. 2 was born after the property had vested in Bandeva whose estate is not divested by his birth. Thus the contest is between the alienees of the widow Bandeva and the reversioner who attacks Bandeva's alienation and has himself mortgaged his rights The point for determination thus being whether Bandeva's alienation was valid and binding? I find in the affirmative."

The defendants Nos. 1 and 2 appealed to the High Court.

G. S. Rao for the appellant.

D. A. Khare for respondents Nos. 1 and 2.

BATCHELOR, J.:—This was a suit to recover possession of certain property and the facts found are that the property originally belonged to one Malam, who died leaving a widow Bandeva and three sons, the eldest being Chanbasappa. All three sons were born deaf and dumb, and as they were therefore disqualified from inheriting, the widow Bandeva succeeded to the estate of

her husband. In October 1900 she sold the property in suit to the plaintiffs.

After Malam's death, Chanbasappa, the disqualified son, married, and a son, defendant 2, was born to him before the widow's sale to the plaintiffs. This son, who admittedly suffers under no disqualification, was not conceived till after the inheritance had passed to Bandeva.

The plaintiffs suing on the sale-deed were met by various defences, as that the sale was fraudulent; that it was made without consideration; that it was made without necessity; and that the sons of Malam were not born deaf and dumb. On all these defences the findings of the Courts below are conclusive against the defendants, and Mr. Rao does not seek to re-open any of these matters now. He puts this appeal on a point of pure law, which is very briefly referred to in the judgment of the lower appellate Court. The contention is that Bandeva, succeeding to her husband, took only a widow's estate, and that estate was divested by the second defendant, the after-born son of Chanbasappa.

Mr. Rao in his interesting argument has referred us to the original texts bearing upon the position of the sons of disqualified heirs, but the point of present concern is so well settled in this Presidency that it is now unnecessary to discuss the original authorities. Mr Rao's contention here goes no further than this, that the qualified son of a disqualified heir is entitled to inherit; and that is a proposition which is not, and cannot be, denied: see *Bapuji* v. *Pandurang* [1].

The difficulty begins with the next step of the argument, in which we are invited to hold that the qualified son of Chanbasappa, though not conceived till after the estate vested in Bandeva, divested Bandeva of the estate which she had taken. Here again the question is not quite at large, for in the already cited case of *Bapuji* v. *Pandurang*[1] a Division Bench of this Court held—and their decision is binding on us—that a nephew, having succeeded to the inheritance in exclusion of a son born deaf and dumb, was not divested by a qualified son born afterwards to

(1) (1882) 6 Bom. 616.

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the disqualified son. That decision followed *Kalidas Das* v. *Krishan Chandra Das*(1) where the judgment of Sir Barnes Peacock, Chief Justice, was held to be based upon principles applicable as well to this Presidency as to Bengal.

It is true that in *Krishna* v. *Sami*(2) the opposite view was taken by a Full Bench of the Madras High Court, but as a Division Bench we are bound by the decision in *Bapuji* v. *Pandurang*(3). This narrows down the controversy to a single point, which may be expressed thus: given that an after-born qualified heir does not divest the estate of a male in whom it has already vested as full owner, is the case different where the estate already vested is merely that restricted estate which a widow takes as heir of her husband? It appears to us that the burden of establishing the affirmative lies heavily on the appellants who contend for it, inasmuch as the general principle is against them. That principle is expressed by Mr. Mayne in his treatise on Hindu Law and Usage (§ 600, 6th Edition) as follows:—"The Hindu Law never allows the inheritance to be in abeyance, and if the claimant is not capable of succeeding at the time the descent takes place, the subsequent removal of his incapacity will not enable him to dispossess a person whose title was better than his while the defect existed, though inferior to his own *after* the defect was removed." In the succeeding paragraphs the learned author discusses the Bombay and Madras decisions which we have cited, and subscribes to the view which found favour in *Bapuji* v. *Pandurang*(3).

It is, no doubt, true, as Mr. Rao has urged, that the principle that an estate once vested shall not afterwards be divested is not quite inflexible, and the learned pleader has pointed to the cases of an adopted son and of a son in the womb, who in certain circumstances will divest the estate of a third person who has succeeded as heir. But these special cases are referable to another principle, which cannot be invoked in favour of the present appellants. A son in the womb who afterwards comes into separate existence is in the eye of the law already born.

(1) (1869) 2 Ben. L. R. 103, F. B. (2) (1885) 9 Mad. 64.
(3) (1882) 6 Bom. 616

And the specially favourable position of an adopted son stands on much the same footing "because" in the words of the Judicial Committee, "of the peculiar law applicable to that relation." [1] And speaking of an adopted child their Lordships continue:—"In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognises as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him."

Mr. Rao has contended that there is some analogy between these cases and the case of the second defendant in this suit, but for our part we can see no analogy. Both in fact and in contemplation of law the second defendant had no existence when the estate vested in Bandeva. It is true that she took only a woman's estate, and that that estate is subject to certain limitations; but those limitations are concerned with her powers of enjoyment and alienation, and do not, as it seems to us, make the inheritance more easily divestible in her hands than it would be in the hands of a male heir. No authority is shown to us for the opposite opinion, and we cannot discover any support for it in principle. The second defendant, it seems to us, stands in no better position than would have been occupied by his father, Chanbasappa, if the latter's disqualification had been removed after the widow had succeeded to the inheritance; and in that case, on the principle already stated, the widow's title would prevail inasmuch as it was superior to Chanbasappa's while his disqualification endured.

No other point is taken, and the result is that the appeal must be dismissed with costs.

Appeal dismissed.

R. R.

(1) *Tagore* v. *Tagore* (1872), 9 Ben. L. R. 377 at p. 397.

APPELLATE CIVIL.

Before Mr. Chief Justice Scott and Mr. Justice Knight.

1908.
June 10.

THE SURAT CITY MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v.* TYABJI DAUDBHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Surat City Municipality—Rules framed in the year 1905, Rules 1 (2), 4 (a), (f) (3), (5), 7(1)*—Water-supply by the Municipality—Notice to cut off the water-supply—Waste—Domestic purposes—Legitimate household purposes—Use of water by* bonâ fide *occupiers of a house.*

The plaintiff, an owner and occupier of a house in Surat, brought a suit against the Surat City Municipality for an injunction restraining the Municipality from cutting off the water-supply which had been provided for him under certain rules in force in the year 1898.

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* Second Appeal No. 111 of 1907.

(1) Rules 1 (2), 4 (a), (f) (3), (5), 7 of the rules framed by the Surat City Municipality in the year 1905 —

1. (1) * * * * * *

(2) In these rules, unless there is something repugnant in the subject or context,

* * * * * *

Domestic purposes mean and include drinking, cooking, washing and other such legitimate household purposes of a family, but do not include house-building or ornamental or kitchen gardening where the area of the garden, exclusive of walks and footpaths, exceeds 200 square yards.

4. Applications for water-connections may be granted by the Municipality subject to the following conditions:—

(a) That the applicant shall not permit any other person except the *bonâ fide* occupier of the house to use the water; and that he shall not sell it.

(f) That the Municipality may at any time cut off the supply or the connection in any of the following events:

(1) * * * * * *

(2) * * * * * *

(3) If water is allowed to run to waste after the owner or occupier has been warned by a written notice issued by the Municipality not to allow it to be so wasted.

(4) * * * * * *

(5) In case of breach of any of the conditions mentioned in this rule.

7. Water used for domestic purposes, except in the case of buildings inhabited by more than three families, shall be supplied by pipes not exceeding ¾ths of an inch in diameter at the following rates:—

(1) For a pipe one-half inch in diameter—one rupee per month.

(2) For a pipe three-fourths inch in diameter—two rupees per month.

The Municipality as defendants contended that under the rules which they had made in the year 1905, they were entitled to cut off the water-connection with the plaintiff's house because he allowed the water to run to waste, inasmuch as it was used by families of tenants who were not of the family of the plaintiff.

Held, that under the rules framed by the Surat City Municipality in the year 1905, so long as the plaintiff occupied a house not inhabited by more than three families (rule 7), he was entitled to the water-supply which he had enjoyed.

Held, further, that the application of the words "run to waste" in rule 4, clause (*f*) (3) depended upon the construction of the definition of "domestic purposes" in rule 1 (2). The definition of "domestic purposes" meant nothing more or less than legitimate household purposes. The user for legitimate household purposes by more than one family in the house was not waste within the meaning of the definition.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Surat, confirming the decree of J. E. Mody, First Class Subordinate Judge.

The plaintiff, who owned and occupied a house at Surat, sued the defendant Municipality for an injunction, alleging that in the year 1898 the Municipality had constructed water works for the supply of water to the inhabitants of Surat, and had granted to the plaintiff's house a water-connection with the main pipe under certain conditions; that subsequently in the year 1905 the Municipality framed a new set of rules with the sanction of Government and under those rules required the plaintiff to make a separate water-connection for each of the families living in his house on pain of cutting off the water-connection in case of non-compliance with the notice and that on non-compliance with the requisition had threatened to cut off the connection. The plaintiff accordingly brought the present suit for an injunction to restrain the Municipality from so doing. He contended that the defendant was not entitled to compel him to make a separate connection for each of the two other families occupying his house and that the new rules gave the defendant no such power.

The Municipality contended that:—

(*a*) When the plaintiff first made his application for making a connection with the street main, he had agreed that he would

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conform himself to all rules which the Municipality might lawfully make from time to time.

(b) That connection was granted subject to those conditions.

(c) That under the new rules sanctioned by the Government, the plaintiff was bound to make a separate connection for each family living in his house, and that the sanction originally granted for the use of one family only could not be utilized for use by other additional families, and further that in case of breach of this rule the Municipality was entitled to cut off the connection. The water was not used for the purpose for which it was given and on this ground also the connection was liable to be cut off.

(d) The rules, if read together, clearly showed that each family was to have a separate connection. The decision of the Managing Committee in this respect had been approved of by the Municipality and that it was not open to the plaintiff to contest that decision.

(e) The demand made by the defendant was therefore quite justifiable and lawful and there was no reason to restrain their action.

(f) The suit for injunction would not lie.

(g) The Court should not interfere with the management of affairs by public bodies like the defendant Municipality.

The Subordinate Judge found that the rules which were passed in the year 1905 and which purported to be framed under section 46 of the District Municipal Act (Bom. Act III of 1901) were not legally binding on the plaintiff, that the rules did not make it compulsory in a house occupied by not more than three families, that each one of the families living in the house should have a separate water-connection direct from the defendant's street main, that the said rules did not empower the defendant to cut off the plaintiff's water-connection, (a) in case such separate connection were not taken for each of the families living in the plaintiff's house, or (b) in case the plaintiff allowed them to take water from the connection originally granted to him, that independently of the rules of 1905 the defendant had no power in any other way or under any other rules to cut off the plaintiff's

water-supply on the grounds mentioned above in clauses (a) and (b), that the Civil Court had jurisdiction to entertain the suit, and that the plaintiff was entitled to the relief asked for. The Subordinate Judge, therefore, passed a decree "restraining the defendant from cutting off the plaintiff's water-supply."

The defendant having appealed the District Judge summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882)

The defendant preferred a second appeal.

L. A. Shah for the appellant (defendant):—The plaintiff got the water-connection from us before the passing of the rules of 1905. In his application for the water-connection he had stated that he wanted the connection for his family and he agreed to abide by any rules which the Municipality might frame. Thus under his agreement the plaintiff was entitled to the water-supply only for his family. In the plaint he admitted that he acted according to the said rules. He is, therefore, bound by them.

It is admitted that the water was used not only by plaintiff's family, but it was also used by two other families residing as tenants in his house. Having regard to the plaintiff's agreement to use water for the purposes of his family, the user by other families amounts to waste according to the definition of that term as given in the rules. That definition means and includes "any use made of water for purposes other than those for which the supply is granted." Thus the plaintiff has allowed the water "to run to waste" The Municipality is therefore entitled to cut off the water-supply under rule 4, clause (*f*) (3).

Apart from the original agreement, under the rules the plaintiff cannot use water for the domestic purposes of more than one family. The expression "domestic purposes" is defined in rule 1, clause 2. It lays down that water is to be used for the purposes of *a* family, that is, one family only. Reading this interpretation with the definition of the term waste, we submit, that the Municipality is entitled to cut off the supply under rule 4, clause (*f*) (3).

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conform himself to all rules which the Municipality might lawfully make from time to time.

(b) That connection was granted subject to those conditions.

(c) That under the new rules sanctioned by the Government, the plaintiff was bound to make a separate connection for each family living in his house, and that the sanction originally granted for the use of one family only could not be utilized for use by other additional families, and further that in case of breach of this rule the Municipality was entitled to cut off the connection. The water was not used for the purpose for which it was given and on this ground also the connection was liable to be cut off.

(d) The rules, if read together, clearly showed that each family was to have a separate connection. The decision of the Managing Committee in this respect had been approved of by the Municipality and that it was not open to the plaintiff to contest that decision.

(e) The demand made by the defendant was therefore quite justifiable and lawful and there was no reason to restrain their action.

(f) The suit for injunction would not lie.

(g) The Court should not interfere with the management of affairs by public bodies like the defendant Municipality.

The Subordinate Judge found that the rules which were passed in the year 1905 and which purported to be framed under section 46 of the District Municipal Act (Bom. Act III of 1901) were not legally binding on the plaintiff, that the rules did not make it compulsory in a house occupied by not more than three families, that each one of the families living in the house should have a separate water-connection direct from the defendant's street main, that the said rules did not empower the defendant to cut off the plaintiff's water-connection, (a) in case such separate connection were not taken for each of the families living in the plaintiff's house, or (b) in case the plaintiff allowed them to take water from the connection originally granted to him, that independently of the rules of 1905 the defendant had no power in any other way or under any other rules to cut off the plaintiff's

water-supply on the grounds mentioned above in clauses (*a*) and (*b*), that the Civil Court had jurisdiction to entertain the suit, and that the plaintiff was entitled to the relief asked for. The Subordinate Judge, therefore, passed a decree "restraining the defendant from cutting off the plaintiff's water-supply."

The defendant having appealed the District Judge summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882).

The defendant preferred a second appeal.

L. A. Shah for the appellant (defendant):—The plaintiff got the water-connection from us before the passing of the rules of 1905. In his application for the water-connection he had stated that he wanted the connection for his family and he agreed to abide by any rules which the Municipality might frame. Thus under his agreement the plaintiff was entitled to the water-supply only for his family. In the plaint he admitted that he acted according to the said rules. He is, therefore, bound by them.

It is admitted that the water was used not only by plaintiff's family, but it was also used by two other families residing as tenants in his house. Having regard to the plaintiff's agreement to use water for the purposes of his family, the user by other families amounts to waste according to the definition of that term as given in the rules. That definition means and includes "any use made of water for purposes other than those for which the supply is granted." Thus the plaintiff has allowed the water "to run to waste" The Municipality is therefore entitled to cut off the water-supply under rule 4, clause (*f*) (3).

Apart from the original agreement, under the rules the plaintiff cannot use water for the domestic purposes of more than one family. The expression "domestic purposes" is defined in rule 1, clause 2. It lays down that water is to be used for the purposes of *a* family, that is, one family only. Reading this interpretation with the definition of the term waste, we submit, that the Municipality is entitled to cut off the supply under rule 4, clause (*f*) (3).

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It was wrong to grant an injunction against the Municipality, and further no case was made out for a perpetual injunction. The most that could have been done was to grant an injunction in a modified form.

V. G. Ajinkya for the respondent (plaintiff) was called upon to answer the contention with respect to the injunction only:— It is discretionary with the Court to grant an injunction. A perpetual injunction was granted because it was considered to be necessary under the circumstances of the case. If the injunction had not been granted the Municipality would have cut off our water-supply at any time. A mere declaration in favour of plaintiff's right without an injunction would be useless inasmuch as a mere declaratory decree cannot be executed and the plaintiff would have to bring a suit every time the Municipality sought to curtail his right. Further if the Municipality frames new rules under the District Municipal Act so as to be binding on the plaintiff, the Municipality would not be prejudiced by the present injunction.

SCOTT, C. J.:—The plaintiff who is a house owner in Surat brought this suit against the Surat City Municipality praying for an injunction restraining the Municipality from cutting off the water-supply which had been provided for him under certain rules in force in the year 1898.

The Municipality as defendants contend that under the rules which they have made in the year 1905, they are entitled to cut off the water-connection with the plaintiff's house.

Now the plaintiff occupies a house which is inhabited by not more than three families, and the water-connection with that house is provided by a pipe half an inch in diameter for which under rule 7 of the Municipal Rules of 1905 the plaintiff is chargeable one rupee a month.

It is not suggested that the plaintiff has not paid the charge of one rupee a month for the water supplied to him, but it is said that he has allowed tenants in the house to use the water-connection, and has therefore rendered himself liable to have his water-supply cut off.

Both the lower Courts have decided in favour of the plaintiff, and we are also of opinion that the plaintiff is entitled to succeed. We think that under the rules so long as the plaintiff occupies a house not inhabited by more than three families, he is entitled to the water-supply which he has heretofore enjoyed; and we think that he has not rendered himself liable to have that water-supply cut off under any of the rules that have been brought to our notice.

It is argued by Mr Shah on behalf of the defendants that they are entitled to cut off the water-supply under the provisions of Rule 4 *(f)* (3) which says that—"If water is allowed to run to waste after the owner or occupier has been warned by a written notice issued by the Municipality not to allow it to be so wasted, the Municipality may at any time cut off the supply," and it is contended that the water is allowed to run to waste because it is being used by families of tenants who are not of the family of the plaintiff This application of the words "run to waste" depends upon the construction of the definition of "domestic purposes" which is contained in the first rule. That definition says that "*domestic purposes* mean and include drinking, cooking, washing and other such legitimate household purposes of a family, ..." and we are asked by Mr. Shah to hold that "of a family" means "of one family only". We however think that the words "of a family" are really surplusage. The "domestic purposes", the subject of this definition, means nothing more or less than legitimate household purposes; and if this is the proper meaning of "domestic purposes" then the user for legitimate household purposes by more than one family in the house is not waste within the definition of "waste" in that rule.

It is next argued by Mr. Shah that the plaintiff has been guilty of a breach of the conditions of Rule 4 in allowing other families than his own to use the water-connection. But if the other families to whom Mr Shah alludes are *bonâ fide* occupiers of the house then according to Rule 4 *(a)* the plaintiff is entitled to permit them to use the water; and there has, therefore, been no breach of the conditions which would entitle the Municipality

Act XII of 1896 (Excise), as modified up to 1st March 1907 ... [illegible]
Act II of 1899 (Stamps), as modified up to 1st March 1907 ... Re. 1 [illegible]

III.—Acts and Regulations of the Governor General of India in Council as originally passed

Acts (unrepealed) of the Governor General of India in Council from 1905 up to date.

Regulations made under the Statute 33 Vict., Cap. 3, from 1905 up to date.

[The above may be obtained separately. The price is noted on each.]

IV.—Translations of Acts and Regulations of the Governor General of India in Council

Act XVIII of 1850 (Judicial Officers' Protection) with footnotes ... In Urdu [illegible] (1a)
Ditto ... In Nagri [illegible] (1a)
Act III of 1864 (Foreigners), as modified up to 1st September 1906 ... In Urdu 1a. (1a)
Ditto ... In Nagri 1a (1a)
Act IX of 1875 (Majority), as modified up to 1st May 1906 ... In Urdu 3p (1a)
Ditto ... In Nagri 3p (1a)
Act VI of 1882 (Companies), as modified up to 1st August 1906 ... In Urdu 13a 3p (3a)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906 ... In Urdu 1a (1a)
Ditto ... In Hindi 1a (1a)
Act XII of 1884 (Agriculturists Loans), as modified up to 1st September 1906 ... In Urdu 6p (1a)
Ditto ... In Nagri 6p (1a)
Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu [illegible] (2a)
Ditto ... In Hindi 3a 3p (2a)
Act I of 1906 [Indian Tariff (Amendment)] ... In Urdu 3p (1a)
Ditto ... In Nagri 3p (1a)
Act III of 1906 (Coinage) ... In Urdu 3p (1a)
Ditto ... In Nagri 9p (1a)
Act V of 1906 (Stamp Amendment) ... In Urdu 3p (1a)
Ditto ... In Nagri 3p (1a)
Act VII of 1906 (Excise Amendment) ... In Hindi 3p (1a)
Act III of 1907 (Provincial Insolvency) ... In Urdu 1a 6p (1a)
Ditto ... In Nagri 1a 6p (1a)
Act IV of 1907 [Repealing and Amending (Rates and Cesses)] ... In Urdu 3p (1a)
Ditto ... In Nagri 3p (1a)

V.—Miscellaneous Publications

Table showing effect of Legislation in the Governor General's Council ... during 1905 ... [illegible] (1a)
Ditto ditto ... during 1906 ... [illegible] (1a)

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1908.

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(Pages 581 to 637.)

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APPELLATE CIVIL.

INDEX.

[illegible] ...ptive father and ... mits to the rule ... could not have ... There were two ... [illegible] ... arties ... ption ... the ... ate.

Held, upholding the adoption that the rule that "no one can be adopted whose mother the adopter could not have legally married" is confined to the specific instances of a daughter's son, a sister's son and the mother's sister's son.

Per Batchelor, J.—The authority of Nanda Pandita must be accepted except where it can be shown that he deviates from, or adds to the Smritis, or where his version of the law is opposed to such established custom as the Courts recognise.

Ramchandra v. Gopal ... ... (1908) 32 Bom. 619

APPEAL—*Application for probate—Value of the subject-matter not exceeding Rs. 5,000—Order of the Assistant Judge—District Judge—Jurisdiction— Bombay* [illegible] *1900), sec* [illegible] *Indian C* [illegible]

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The mortgagor thereupon filed a suit, impleading both the mortgagee and assignee as defendants. The plaint contained, in substance, a claim for redemption, but it also prayed that the defendants should be required to interplead concerning

Held, that it was erroneous to treat the suit as only one of interpleader. Inasmuch as the plaint also contained in substance a claim for redemption, that was the appropriate relief under the circumstances.

Vyvyan v. *Vyvyan* (1861) 4 De G. F. & J 183, followed.

and 4. This condition will only attach to those lands which are included in the Mulgeni lease. In regard to the lands not so included the plaintiff will be entitled to unconditional possession and mesne profits from the year 1902-03 till delivery of possession or until the expiration of three years from the date of this decree whichever event first occurs.

Costs on the respondents throughout.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

BANI MUNCHARAM AND ANOTHER, PLAINTIFFS, v. REGINA STANGER, DEFENDANT.*

1907. *December* 20.

Suit for Ejectment—Contract Act (IX of 1872), section 23—Immoral transaction

If a plaintiff cannot make out his case except through an immoral transaction to which he was a party he must fail.

Fivaz v. *Nicholls* (1), followed.

THE facts of this case appear sufficiently from the judgment.

Inverarity with him *Raikes* and *Jinnah* for plaintiff.

This is in the nature of a hire and purchase agreement. The property in the goods is not parted with. Suppose there is a transfer of property and suppose the agreement is illegal, section 84 of the Transfer of Property Act applies. The transferor is not *in pari delicto* with the transferee. The property in the furniture has not passed: *Ex parte Crawcour* (2); Benjamin on Sale (5th Edn.), p. 327. We admit our plaint is inartistically drawn but the claim is not based on the lease. There is no prayer for payment of rent. Possession is asked for in general terms. The

* Suit No. 737 of 1907.

(1) (1846) 2 C. B. 501.
(2) (1878) 9 Ch. D 419.

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v.
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plaint is not defective as we are not suing on the covenant; we don't declare that the lease is forfeited; we ask leave to amend our plaint

Talyarkhan and *Bhandarkar* for defendant.

The defendant is a public prostitute, the premises were demised and the furniture assigned to her with that knowledge and for the purposes of her trade.

The property has passed: (1) the right title and interest of the plaintiffs as lessees of Nensey Khairaj and Co. has passed by the demise of the premises; (2) possession of the furniture has been taken.

If money is paid or property is delivered under an illegal contract it cannot be taken back: *Ayerst* v. *Jenkins* [1]. *In pari delicto potior est conditio defendentis* is a maxim of public policy: see Eyre, C. J.'s Judgment in *Lightfoot* v. *Tenant* [2]; see also *Tamarasherri Sivithri Andarjanom* v. *Maranat Vasuderan Nambutripad* [3]. A person who lets lodgings to an immodest woman cannot recover rent in an action for the same: *Pearce* v. *Brooks* [4]; *Smith* v. *White* [5]; *Taylor* v *Chester* [6]. The defendant cannot be called upon to surrender where there is a void covenant: *Scarfe* v. *Morgan* [7]. See also Transfer of Property Act, s. 6: *Shiam Lal* v. *Chhaki Lal* [8].

The property in the furniture has passed, section 78 of Contract Act.

RUSSELL, J.:—This case to my mind raises an interesting question of law, upon which I have been unable to find any direct authority.

The suit related to a certain house and the furniture therein situated at Arthur Road, and the plaintiff is according to himself a milliner and dress-maker in Falkland Road, and a Bhniah by caste; and apparently for some time past he had been minded

(1) (1873) L. R. 16 Eq. 275.
(2) 1796) 1 B. & P 551 at p. 554
(3) (1881) 3 Mad 215.
(4) (1866) L. R. 1 Ex. 213; 35 L. J. Ex. 134.
(5) (1866) L. R 1 Eq 626: 35 L J. Ch. 454
(6) (1869) L. R. 4 Q B 309.
(7) (1838) 4 M. & W. 270 at p. 281.
(8) (1900) 22 All. 220.

to add to the gains of his millinery shop by keeping a [illegible], as he very frankly admits.

The defendant is a Jewish lady of quality, and apparently this is the first transaction which she has had with the plaintiff.

It appears that the house in question is the property of a firm in Bombay and by an indenture of lease dated the 1st April 1903, made between that firm and the plaintiff, the firm let to the plaintiff this bungalow at Rs. 200 a month for two years. But the plaintiff did not obtain possession of the bungalow until the 10th of July 1906. If I may misapply an expression derived from the Roman Law, I may say that the plaintiff acquired in this house a *damnosa hereditas* because it appears that when it was let to him it was occupied by another lady of quality called Sophia or Sophie. Sophie was opposed to leaving the house in question. The result was this firm took steps at the instance of the plaintiff to eject Sophie; and consequently a suit was filed for that purpose: the suit, however, failed and the plaintiff had to pay no less than Rs. 4,200 and costs of that suit to eject Sophie.

Then, according to his plaint, he got possession on the 10th of July 1906.

Then again he had singularly bad luck in letting this house, because he let it to another lady of quality and he had to incur costs to the extent of Rs. 900 to get rid of her, and if I can judge from his evidence, a much larger sum than that.

Having met with bad fortune initially, the plaintiff was minded to lease the house to the defendant, whose acquaintance apparently he had made through his clerk and agent, who is called James Monroe or "Jimmy the lawyer," and who also has taken a certain part in getting the present lease drawn up. Being so minded, the plaintiff executed a lease to the defendant which has been put in evidence, and set out in para. 3 of the plaint as follows:—' By an indenture of lease bearing date the 5th day of July 1907 and made between the plaintiffs of the one part and the defendant of the other part in consideration of the sum of Rs. 3,500 paid by the defendant to the plaintiff on the execution of the said lease and in consideration of monthly rent of Rs. 1,300

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agreed to be paid by the defendant o the plaintiff the plaintiffs sub-let to the defendants the said bungalow and also assigned to her the furniture standing in the said bungalow and specified in the list hereto annexed and marked B subject to the provisions conditions and covenants contained in the said indenture of lease. A copy of the said indenture is hereto annexed and marked C."

It will be observed therefore that evidently the plaintiff was desirous to make up as much leeway as he could by the demand of an enormous rent of Rs. 1,300 per month and an enormous sum of Rs. 3,500 for the furniture, because it appears from the terms of the lease that the payment of Rs. 3,500,—although it is stated in the lease to be a premium,—was really to go in part payment of this furniture, and at the expiration of the lease, by reason of the defendant paying Rs. 1,300 a month and this sum of Rs. 3,500, she was to be the absolute owner of the furniture at the end of the period.

Then the plaint goes on, para. 4 :—"By the said indenture of lease it is *inter alia* provided and agreed that if the said monthly rent of Rs. 1,300 or any part thereof should be in arrears for the space of three days next after any of the said days whereupon the same ought to be paid as aforesaid or if any of the covenants therein contained on the part of the defendant should not be observed and performed by her then it should be lawful for the plaintiffs at any time thereafter to enter into and upon the said demised premises and assigned furniture."

Then para. 5 of the plaint is as follows :—"The defendant is using the said premises for immoral purposes and has not paid to the plaintiffs any portion of the rent due by her to the plaintiffs."

Now it appears to me that the statement in that paragraph is absolutely misleading, because it is obvious from the wording of the plaint that it is put forward as a reason for the plaintiff being anxious to eject the defendant the fact that he has discovered that she is using the premises for immoral purposes. On the other hand, as the plaintiff very frankly admitted, his intention was from the very beginning to lease this property to the defendant for the purposes of a brothel in order to recoup himself if possible

the losses he had incurred apparently through Sophie and the other lady.

In para. 6 of the plaint, the plaintiffs refer to their attorneys' letter of the 27th August 1907, which runs as follows:—"Under instructions from our clients Bani Mancharam Pitamber and Ramji Bhoola we have to state that under an indenture of lease dated 5th July 1907 you are liable to pay a monthly rent of Rs. 1,300 for the furnished premises at Arthur Road from the 1st of August 1907. It appears that the said Bani Mancharam Pitamber and Ramji Bhoola repeatedly called upon you but you have failed to pay the amount of Rs. 1,300 which became due on the 1st of August 1907.

"This is now to give you notice that you are required to pay to our clients or to us as their attorneys the sum of Rs. 1,300 within 24 (twenty-four) hours after receipt hereof and to require you to give to our clients possession forthwith of the furnished premises which by reason of the proviso contained in the said lease you are bound to give. Please note that in default of your compliance with the above requisition within 24 (twenty-four) hours as aforesaid, our clients will take further steps in the matter at your risk as to costs and consequences."

Therefore, I say it is perfectly plain to my mind that by the plaint, which embodies in it that letter, the plaintiff is relying upon this lease in respect of the cause of action that he alleges against the defendant, and the ground upon which he seeks to make her vacate the house and the premises is that she has not paid the rent which is mentioned in that lease.

Now I have here to point out, again within a very few days, the risk that litigants are exposed to unless they have their plaint drawn up under the best advice they can get. Mr. Inverarity said that the plaint was drawn in an inartistic way, and if the plaint is defective it is owing to the extreme old age of the plaintiff's attorney Mr. Khanderao, who, he said, is the oldest attorney of this Court; but the extreme old age of an attorney may account for but cannot to my mind excuse a defective plaint.

The question then arises: Is the plaintiff entitled to any relief upon this plaint?

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Here again I must point out that the written statement was also drawn up by an attorney but not artistically ; but fortunately it does raise the question that the plaint is a bad plaint, and the question is specifically raised in the 6th issue.

Therefore, I am justified in treating the written statement as equivalent to what was formerly known as a demurrer and raising the point namely that the plaint upon the face of it is bad in law. This is the question to which I now propose to address myself ; and the cases I propose to cite are intended to support the proposition that if the plaintiff cannot make out his case except through an immoral transaction to which he was a party he must fail. The plaintiff's case as to the claim to the house and premises and to the furniture stands on the same footing.

It is not necessary for me now to cite section 23 of the Contract Act because it is well known that it gives the definition of "unlawful agreements," and, amongst others, agreements are unlawful when they are immoral.

The first case is the case of *The Gas Light and Coke Company* v. *Turner* (1). That was confirmed in the Exchequer Chancery, reported in 6 Bingham's New Cases, 324. I do not cite this case as being pertinent to the present question in this sense, for Mr. Inverarity says truly that the present is not a case for rent arising out of the lease. The headnote is as follows :—"It was held a good plea in covenant for rent, that the lease was entered into by plaintiff and defendant, and that the premises were let to defendant for the express purpose of being used by defendant in drawing oil of tar and boiling oil and tar, contrary to the provisions of the Building Act."

That of course was a suit for rent and the defendant successfully said that it was an unlawful agreement. But the importance of the decision appears in the remarks towards the end of the judgment, where, at page 678 last para., Tindal, C. J., says :— "And, further, if an ejectment were brought by the lessors to recover possession, on the ground that the lease was void, it might be difficult for the lessee to maintain his right to hold under the

(1) (1839) 5 Bing. N. C. 663.

lease, after having pleaded in the present action, in which he and the lessors were parties, that the indenture was void, and obtained the judgment of the Court in his favour on that plea. Without, however, giving any opinion on that point, we think, for the reasons before given, that the defendant is entitled to judgment on this record."

This passage shows that the Chief Justice was of opinion that a suit for ejectment would lie because it would be impossible for the defendant to plead the illegality of the lease after having pleaded in the action before him that it was void.

The same point is referred to in the case of *Taylor* v. *Chester* (1). There it is said that the maxim "*In pari delicto potior est conditio possidentis*" applied. That was a deposit of half of £50 Bank note for the purposes of the supply of wines and suppers to the plaintiff by the defendant in a brothel kept by her to be there consumed in a debauch. As the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. Mr. Justice Hannen, in the course of the argument, said: "If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he cannot bring ejectment?" So, that again seems to show that he could bring ejectment. Mr. Justice Mellor, in delivering the judgment of the Court, at page 314, says: "The true test for determining whether or not the plaintiff and the defendant were in *pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." He cites *Simpson* v. *Bloss* (2) and *Fivaz* v. *Nicholls* (3), and to my mind the latter is a case very much in point, I refer to the judgment of Tindal, C. J., who says at page 512:—"I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered

(1) (1869) L. R. 4 Q. B. 309.
(2) (1816) 7 Taunt. 246.
(3) (1846) 2 C. B. 501.

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into between himself and the defendant. That is an objection that goes to the very root of the action. Suppose, instead of resisting the action brought against him by Rouse, the plaintiff had paid the money, he could not have recovered it back had he attempted to do so, he would have been met by the maxim of law, *ex dolo malo non oritur actio.* If he could not succeed in such an action, I do not see how he can recover damages in a Court of law for an injury incidentally resulting from the same state of circumstances, inasmuch as he must put in the very front of his declaration the illegal agreement to which he has been a party. The case of *Simpson* v. *Bloss* (1) seems to me in effect to decide the present."

In the present case the plaintiff must put in the forefront of his plaint the agreement to which he has been a party, but which was an immoral one *ab initio.* The proposition is stated in Broom's Legal Maxims (7th Edn.) at pages 547 and 548 thus:—"The maxim *in pari delicto potior est conditio possidentis* is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but it is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back; for the Courts will not assist an illegal transaction in any respect. The maxim is, therefore, intimately connected with the more comprehensive rule of our law, *ex turpi causâ non oritur actio,* on account of which no Court will 'allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal'; and the maxim may be said to be a branch of that comprehensive rule; for the well-established test, for determining whether money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction: if he 'requires aid from the illegal transaction to establish his case' the Court will not entertain his claim."

(1) (1816) 7 Taunt. 246.

Similarly, in the case of *Smith* v. *White*[1], the headnote is: "A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel: and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee which was being administered:—*Held*, that the assignment, and everything arising out of it, was so tainted with the immoral purpose, that the plaintiff could not recover."

At page 630, Vice-Chancellor Kindersley says:—"Now, it appears to me that the authorities clearly show that out of such a transaction as this no legal right can be created; and that no action would lie for the rent, or for the breach of any of the covenants, or for anything else arising out of the transaction."

In the case of *Pearce* v. *Brooks*[2], Chief Justice Pollock, C. B., says:—"Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other."

Now, here, in my opinion, it is perfectly clear that the plaintiff and the defendant are in *pari delicto*. That that is essential is also proved by the case of *Reynell* v *Sprye*[3], where it is said:—"But where the parties to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne* v. *Williams*[4] is one."

(1) (1866) L. R. 1 Eq. 626.
(2) (1866) L. R. 1 Ex. 213 at p. 218.
(3) (1852) 1 De G. M. & G. 660 at p. 679.
(4) (1811) 18 Ves. 379.

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It seems to me, therefore, that looking at all these cases and the plaint as framed, the plaintiff is not entitled to recover anything in this suit at present.

I heard a most ingenious argument from Mr. Inverarity yesterday morning which had the effect of making me take further time to consider my judgment; but it appears to me that the result of his argument is to show how manifestly unjust it would be to allow any amendment of the plaint to be made now. No suggestion of an amendment of the plaint was made until the very close of his argument. The defendant went to trial upon the statements of the plaint, which, she said, was a bad plaint on the face of it. I think—but I don't intend to express any opinion whatever—there may be a great deal in the argument of Mr Inverarity addressed to me by him under section 6, cl. 8 (*h*), of the Transfer of Property Act, the effect of which would be that this lease was void *ab initio*. I do not express any opinion as to whether the plaintiff would be entitled to succeed had it been that this lease was void *ab initio*, and therefore no transfer of any property could be effectual under it and under that section of the Transfer of Property Act.

Again, with regard to section 84 of the Indian Trusts Act, that he relied upon, that also may be put forward to form a good cause of action for the plaintiff.

On the other hand the defendant has had no opportunity of raising the defence which would be open to her if the suit had been framed upon the basis of section 84 of the Transfer of Property Act, upon the authority of the well-known case *Ayerst* v. *Jenkins*[1] which is cited in Messrs. Shephard and Brown's Transfer of Property Act, 6th Edition, page 51. "In cases not within this section it is conceived that the transferor cannot reclaim the property, since the transferee is protected by the principle *in pari delicto potior est conditio possidentis* A completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrevocable both at law and in equity."

(1) (1873) L. R. 16 Eq. 275.

I, therefore, am not going to be led to consider either of the two questions thus raised by the learned counsel I only deal with the pleadings as they are before me.

The conclusion I have come to is that the plaint as framed is a bad plaint inasmuch as the plaintiff by his pleadings has relied upon the lease which the law declares to be immoral and, therefore, unlawful.

It is to be regretted, as I said before, that this point was not distinctly set forth in the written statement and that the Court has been asked to go into several side issues.

As to the question of fraud and misrepresentation, Mr. Inverarity asked me to express an opinion on it, as Mr. Laud, a partner in the firm of the plaintiff's attorneys, is concerned in the matter. With regard to that, for the purposes of this suit only and not to be used in any other suit all I can say is, the defendant upon whom this onus lies, has failed to convince me that she was defrauded or that any misrepresentation was practised on her with reference to this lease. It is unfortunate she had got no independent advice. But she certainly had, with her, her companion, another Regina. The defendant struck me, as far as I could judge, as an intelligent person; and she spoke English with a perfectly pure intonation and accent and she understood every word she said, and I think, looking at the evidence of Mr. Laud upon the point, it would be impossible for me to hold that any misrepresentation or fraud had been practised upon her. The probabilities are that the wish was father to the thought, that having entered into a lease and left the office and seeing that it was a very undesirable bargain for herself, she probably thought a very great deal about it and may have persuaded herself, that she was a victim of misrepresentation and fraud. That the bargain was in favour of the tailor and milliner it is impossible to deny.

[Here his Lordship recorded his findings on the issues]

I grant leave to the plaintiff to withdraw the suit with liberty to file a fresh one if so advised. But I direct that he do pay all the costs of this suit down to and inclusive of to-day. If he

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does not choose to withdraw the suit with the liberty I have given him, his suit will stand dismissed with costs throughout.

Mr. Jinnah says that he undertakes to withdraw this suit and file a fresh suit at once.

The order is to be drawn up so as to make the payment of the costs of the suit a condition precedent to the plaintiff's bringing a fresh suit.

The fresh suit to be filed within a month from this date.

Rs. 5,000 to be deposited forthwith with the Prothonotary for the defendant's costs subject to the taxation of the bill.

Attorneys for plaintiffs :—*Messrs. Khanderao, Land & Mehta.*

Attorneys for the defendant :—*Mr. M. B. Chothia.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.
February 14.

JAGGANATH HIRALAL (APPELLANT AND PLAINTIFF) *v.* TULKA KERA AND OTHERS (RESPONDENTS AND DEFENDANTS).*

Practice—Interpleader suit—Suit to redeem mortgage against two parties claiming mortgage money—Appropriate Relief.

When a mortgagor was about to pay off the mortgage amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage amount. The mortgagor thereupon filed a suit, impleading both the mortgagee and assignee as defendants. The plaint contained, in substance, a claim for redemption, but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage amount and that the mortgagor should be indemnified in consequence of the loss of the original mortgage deed. Prior to the hearing the defendants agreed that the assignee was entitled to receive the mortgage amount. The suit was dismissed on the grounds that no interpleader suit could lie as the plaintiff sought an indemnity from one of the defendants which gave him a personal interest in the suit. On appeal,

* Suit No. 355 of 1907. Appeal No. 1507.

Held, that it was erroneous to treat the suit as only one of interpleader. Inasmuch as the plaint also contained in substance a claim for redemption, that was the appropriate relief under the circumstances.

Vyvyan v. *Vyvyan*(1), followed.

THE plaintiff and his brother Purshotam Hiralal were entitled in equal shares to a property situate at Bhatwadi in Bombay. On the 25th March 1895 Purshotam Hiralal mortgaged his undivided share to the plaintiff for Rs. 1,250 at 6 per cent. per annum; and on the 7th September 1895 Purshotam Hiralal mortgaged the same to defendants 1—4, Tulka Kera and Company, for Rs. 5,000 at 12 per cent. per annum subject to the first mortgage. Subsequently Purshotam Hiralal became an insolvent. The plaintiff under his mortgage of the 25th March 1895 advertised Purshotam Hiralal's half share for sale and the sale was fixed for 20th February 1907. Before the sale, however, Messrs. Payne and Company for defendants 1—5 tendered to the plaintiff the sum due on the first mortgage. Defendant No. 5 at that time was the proposed transferee of the second mortgage from Tulka Kera and Company. The plaintiff accepted the proposal suggested by Messrs. Payne and Company and the sale was stopped. Shortly after that the Official Assignee, who was the assignee of the estate and effects of Purshotam Hiralal, put up Purshotam Hiralal's half share in this property for sale and the plaintiff bought it at such sale for Rs. 5,000 subject to the first and second charges, and on the 16th March 1907 the Official Assignee duly executed in favour of the plaintiff a conveyance of the insolvent's undivided share and interest in the said property subject to the said charges.

The first defendant Tulka Kera was the only partner of the firm of Tulka Kera and Company then present in Bombay and as by the indenture of 2nd mortgage it was expressly provided that such partner or partners of the firm of Tulka Kera and Company as might for the time being be present in Bombay, should be entitled to execute a reconveyance in respect of the 2nd mortgage, the plaintiff through his solicitors offered to pay to the 2nd mortgagees and their proposed assignee the amounts

(1) (1861) 4 De G. F. & J. 183.

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of principal, interest, and costs *properly* due under the 1st and 2nd mortgages, under the belief that the amount of the 1st mortgage had been paid by or on behalf of the 2nd mortgagees and the plaintiff was ready and willing to obtain from the 1st defendant Tulka Kera a reconveyance of the property, the 5th defendant Haji Jakaria Haji Ahmed Patel joining in the same as the proposed transferee of the 2nd mortgage.

Messrs. Payne and Company also informed the plaintiff's solicitors that the original indenture of 2nd mortgage had been mislaid or was missing and the plaintiff's solicitors therefore proposed that the 2nd mortgagees should execute a deed of indemnity in favour of the plaintiff in respect of the missing deeds.

At about this time the 2nd, 3rd and 4th defendants through their attorneys informed the plaintiff's attorneys that they did not agree to the proposed transfer of the 2nd mortgage to the 5th defendant and demanded from the plaintiff payment of the amount due on the 2nd mortgage and threatened to file a suit against him in default The first defendant Tulka Kera in April 1907 through the attorneys of the 2nd, 3rd and th defendants also wrote to the plaintiff's attorneys alleging that he had not instructed his former attorneys Messrs. Payne and Company to act for him in the matter of the reconveyance and alleging that the arrangement for a transfer of the 2nd mortgage to the 5th defendant had fallen through and that he was not aware that Messrs. Payne and Company had paid the amount of the first mortgage, and demanding payment of the 2nd mortgage and threatening to file a suit against the plaintiff in default of payment. Messrs. Payne and Company on behalf of the 5th defendant had also written to the plaintiff's attorneys alleging that the agreement for transfer of the 2nd mortgage was subsisting and binding and warning the plaintiff against paying the amount of the 2nd mortgage to the 2nd mortgagees.

The plaintiff thereupon filed this suit alleging that he had always been ready and willing to pay to the party or parties who might be declared properly to be entitled to the same, the respective amounts of the principal and interest due in respect

of the 1st and 2nd mortgages and the mortgagees' costs thereof and submitted that upon such payment he was entitled to redeem the undivided moiety of Purshotam Hiralal and that he was entitled to have a proper reconveyance executed in his favour in respect thereof by the party or parties who may be declared to be entitled to be indemnified by the defendants or some of them in respect of the alleged loss of the original indenture of 2nd mortgage, but in consequence of the rival claims made to the said money on behalf of the 1st defendant on the one hand and the 2nd, 3rd, 4th defendants and the 5th defendant on the other hand, he was unable to pay the same to the said defendants or any of them until their claims *inter se* to the same should be decided by the Court.

The plaintiff brought into Court the sum of Rs. 12,442-11-0 and alleged that he had always been willing and still was willing to pay the costs of and incidental to the reconveyance of the said property when ascertained. He alleged that he had no interest in the sum of Rs. 12,422-11-0 otherwise than as a stake holder, but rival claims had been made thereto by the defendants as before stated.

Under the aforesaid circumstances and in the events that have happened the plaintiff prayed as follows :—

(*a*) That the defendants may be restrained by the order and injunction of this Honourable Court from taking any proceedings against the plaintiff, in respect of the amounts due on the said 1st and 2nd mortgages

(*b*) That the said defendants may be required to interplead together concerning their claims to the 1st and 2nd mortgages.

(*c*) That all necessary and proper directions may be given and orders passed for the payment to the defendant or defendants entitled thereto of the sum brought into Court as aforesaid.

(*d*) That upon payment of the amounts due on the said 1st and 2nd mortgages and the costs of and incidental to the reconveyance thereof when ascertained to such of the defendants as may be declared entitled to receive the same, the plaintiff and the undivided moiety of the said Purshotam Hiralal in the property described in Schedule A hereto which has been purchased by the plaintiff may be discharged from all liability in respect of the said 1st and 2nd mortgages to any of the defendants herein.

(*e*) That upon payment of the moneys justly due to them or any of them the defendants or some of them may be directed to execute in favour of the

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(*c*) That all necessary and proper directions may be given and orders passed for the payment to the defendant or defendants entitled thereto of the sum brought into Court as aforesaid.

(*d*) That upon payment of the amounts due on the said 1st and 2nd mortgages and the costs of and incidental to the reconveyance thereof when ascertained to such of the defendants as may be declared entitled to receive the same, the plaintiff and the undivided moiety of the said Purshotam Hiralal in the property described in Schedule A hereto which has been purchased by the plaintiff may be discharged from all liability in respect of the said 1st and 2nd mortgages to any of the defendants herein

(*e*) That upon payment of the moneys justly due to them or any of them the defendants or some of them may be directed to execute in favour of the

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plaintiff a proper deed or deeds of reconveyance and a deed of indemnity (the latter at the costs of the party executing the same); such deed or deeds if necessary to be settled by this Honourable Court.

(*f*) That the defendants or some of them may be ordered to pay the plaintiff's costs of this suit.

(*g*) That the plaintiff may have such further or other relief as the nature of his case may require.

Before the suit came on for hearing defendants 1—4 relinquished their claim to be paid the amount due on the 2nd mortgage and admitted the 5th defendant's right to receive it.

The 5th defendant submitted that having regard to the pendency of a suit in which the rights of the 5th defendant and the other defendants could and would be properly decided the plaintiff was not justified in filing the suit of interpleader. He further alleged that the amount brought into Court by the plaintiff was not sufficient to satisfy his claim in respect of the 1st and 2nd mortgages respectively.

Russell, J., dismissed the suit with costs on the ground that no interpleader suit could lie (1) because the plaintiff sought an indemnity from one of the defendants in respect of the loss of the mortgage-deed and (2) a decree in an interpleader suit could not be passed unless there were two active claimants in respect of the property.

Against this decision the plaintiff appealed.

Weldon (with *Robertson*) for the appellant.

The Court said we should have filed a suit for redemption but see *Vyvyan* v *Vyvyan* [1]. Suit No. 337 is filed against Tulka Kera personally and not against the firm; he is not sued as a partner.

Davar with *Jinnah* for respondent No. 1.

The plaintiff had full knowledge of Suit No. 337 of 1907 which was filed on the 17th April 1907 and in which the rights of the 5th defendant and the 1st defendant would have been decided. In spite of this however, the plaintiff filed an interpleader suit two days afterwards that is on 19th April 1907. If

(1) (1861) 4 De G. F. & J. 183.

the plaintiff wanted to pay off the amounts of the 1st and 2nd mortgagees and if there was any dispute as to who should receive the amount of the 2nd mortgage the proper remedy was to file a redemption suit. In his plaint the plaintiff claims personal relief and the law is that in an interpleader suit the plaintiff should not claim personal relief and that he should have no interest in the thing claimed otherwise than as a shareholder. Turning to the prayers of the plaint it will be seen that in prayers "D" and "E" he claims personal relief. In *Bignold* v. *Audland*[1] it was decided that if the plaintiff is interested in the subject matter the suit shall be dismissed.

There is also an English case *Mitchell* v. *Hayne*[2] in which it has been held that where a plaintiff represents not merely that he has a lien with respect to which two other persons have adverse rights but that there is a further question to be litigated adversely between himself and one of them, that is not a case of interpleader.

Chamier for respondent No. 5.

JENKINS, C. J.:—This is an appeal by the plaintiff from a decree dismissing his suit with costs on the ground that it is an interpleader suit, and so not maintainable.

In my opinion the learned Judge has been misled by the terms in which the suit evidently was described before him, for to treat it as only a suit of interpleader is to disregard paragraphs (*d*), (*e*) and (*g*) of the prayer to the plaint. Those paragraphs contain in substance a claim for redemption, and that in the circumstances is the appropriate remedy (cf. *Vyvyan* v. *Vyvyan*[3]). The dismissal of this suit might possibly result in the loss to the plaintiff of his right to redeem and that no one could have intended.

The decree of the first Court must therefore be set aside. It is now conceded that the first four defendants have no such right as was claimed by them, and it is agreed that the principal and interest payable to the 5th defendant up to the institution of the suit is Rs. 2,480-3-0 on the first mortgage and

(1) (1840) 11 Sim. 23. (2) (1824) 2 Sim. & St. 63.
(3) (1861) 4 De G. F. & J. 183.

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Rs. 10,000 on the second mortgage with interest at 6 per cer Rs. 1,250 from the 20th February 1907. The only dispute to when interest should cease to run. I think in the sp circumstances of this case that it did not cease on payme the amount into Court, but on the other hand I hold it sh not run beyond the 7th of October 1907, the date of the d under appeal, as it was the 5th defendent who raised the that this suit was not maintainable, and thus delayed payme the mortgage money.

There must, therefore, be a decree declaring what on this l is the amount due, the figure to be settled by the Court i parties cannot agree, and further declaring that the defendant alone is entitled to receive the same, and then t will be the usual decree for redemption save that by consent time for payment will be one month, and there must be a di tion that the defendants do give at the expense of the defend 1 to 4 a good and effectual indemnity in respect of the los the title-deed to indemnify the plaintiff, his heirs and assigns and their estate and effects and the mortgaged property f and against all loss, costs, charges, damages and expenses other consequences, which the plaintiff, his heirs or assigns of mortgage property shall or may incur, sustain or become liabl for or by reason of or on account or in respect of the loss.

The plaintiff must pay the 5th defendant's costs of the suit, not of the appeal as it was the issue raised by the 5th defend that occasioned the necessity of this appeal. It was unjustifiable position taken up by the first four defendants t necessitated the suit and therefore they must bear the plaint costs of it including the costs he has to pay the 5th defendan

It was the issue raised by the 5th defendant that procured dismissal of the suit and so brought about this appeal, there half of the plaintiff's costs of this appeal must be borne by 5th defendant and the other half will be borne by the o defendants.

Attorneys for the plaintiff—*Messrs. Little & Co.*

Attorneys for defendants—*Messrs. Mulla & Mulla Messrs. Payne & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

HAJI BIBI, PLAINTIFF, *v.* H. H. SIR SULTAN MAHOMED KHAN AND OTHERS, DEFENDANTS *

1908. *February* 24.

Practice—Plaintiff, meaning of—Judicature Acts 36 and 37 Vict., Ch. 66, section 100—Civil Procedure Code (Act XIV of 1882), sections 26, 179, 180—Right to begin—Some of defendants supporting plaintiff's case—Order in which to address the Court.

The word "plaintiff" means "every person asking relief against another person."

The plaintiff and such of the defendants as support the plaintiff's case, wholly or in part, must address the Court and call their evidence in the first place, and then following the words of section 180 of the Civil Procedure Code the other party, namely the persons opposed to the plaintiff's case and that of the other defendants supporting the plaintiff, must address the Court and call their evidence.

IN this case the defendants 2 and 9 to 14 who supported the plaintiff's case claimed the right to call their evidence after that of the defendants 1 and 3 to 8 who were opposed to the plaintiff had called theirs.

Bahadurji (with *Setalvad*) for plaintiff.

Inverarity (with him *Raikes* and *Lowndes*) for defendant No. 1.

Bahadurji and *Desai*, for defendant 2.

Jardine and *Robertson*, for defendant 3.

Branson and *Vicaji*, for defendants 4 and 6.

Scott, Advocate General and *Strangman*, for defendant 5.

Padsha and *Lalkaka*, for defendants 7 and 8.

Desai with *Setalvad* and *Darar* for defendants 9 to 14.

RUSSELL, J.—Since this point was raised by the Advocate General, and considering as I do that it is one of very great importance to the parties and is also one with regard to which I have been unable to find any direct authority either in India or under the English practice (and I have searched all the authorities

* Suit No. 729 of 1905

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I could think of), I carefully considered it. In the first pl appears to me that it must be a question for the discretio this Court to decide. I am seized of this case and it is my to see that the case is tried in a fair and proper manner wi prejudice or injury to either side as against the other.

Now, I have been unable to find any definition of the "plaintiff" under the Indian Procedure; but I find in Judicature Act in England a section, *viz.* section 100, which that the word "plaintiff" "shall include every person asking relief (otherwise than by way of counter claim as a defend against any other person by any form of proceeding, whe the same be taken by action, suit, petition, motion, summons otherwise."

Therefore, I think, common sense tells us that "plaintiff" ou to mean, "every person asking relief against another person.

I have read the plaint and all the written statements since t case was last on, and the conclusion I have come to is that with doubt the plaintiff and the second defendant and defendants 9 14 must be considered as—to use a colloquial expression—be in the same boat, although no doubt defendants 9 to 14 not seeking any relief possibly beyond that of the plaintiff a the second defendant; and, therefore, you have these two for arrayed against each other—the plaintiff and the second defer ant and defendants 9 to 14 against the other defendants in t suit.

Now I must come to the Code of Civil Procedure. Section of the Code says:—"All persons may be joined as plaintiffs whom the right to any relief claimed is alleged to exist, wheth jointly, severally or in the alternative, in respect of the sa cause of action."

It appears to me that there was originally nothing to preve the second defendant from joining the plaintiff in the plain and probably there was nothing to prevent defendants 9 to 1 from joining the second defendant and the plaintiff.

Now, what do we find in Chapter XV of the Code? Sectio 179 says: "On the day fixed for the hearing of the suit or on an

other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." The explanation to it is:—"The plaintiff has the right to begin, unless where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

Then see what section 180 says; and that seems to me what ought to guide me in this matter. Section 180 does not say: "the defendant shall then state his case", but "the other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case;"—"the other party," that is to say, the other opposing force. It seems to me that if I were to accede to the arguments of Mr. Bahadurji, counsel for the plaintiff, and Mr. Setalvad, counsel for defendants 9 to 14, it would enable a plaintiff to make parties defendants instead of plaintiffs and thus enable them to meet the case of such defendants as was opposed to the plaintiffs during the course of the hearing as the case went on. Thus, in the present case the plaintiff would begin her case; then the first defendant, who is the other party, would state his case and call his evidence; then the second defendant, who supports the plaintiff's case would state her case and call her evidence; then possibly the third defendant, who is opposing the plaintiff would open her case and call her evidence; and so on, so that the record would be in a hopeless state of confusion. Further, such a procedure would enable such of the defendants as supported the plaintiff to adduce from time to time new and further evidence to meet the points suggested in the evidence of the defendants opposed to the plaintiff. I certainly thought after plaintiff's cross-examination was finished that the second defendant and the other defendants in the same interests as the plaintiff, were going to accede to this view. For when they were asked whether they intended to examine the plaintiff before her cross-examination began, they said they did not wish to examine her; and thereupon she was cross-examined by Mr. Inverarity, and then

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I could think of), I carefully *considered it*. In the first place it appears to me that it must be a question for the discretion of this Court to decide. I am seized of this case and it is my duty to see that the case is tried in a fair and proper manner without *prejudice* or injury to either side as against the other.

Now, I have been unable to find any definition of the word "plaintiff" under the Indian Procedure; but I find in the Judicature Act in England a section, *viz*. section 100, which says that the word "plaintiff" "shall include every person asking any relief (*otherwise than* by way of counter claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise."

Therefore, I think, common sense tells us that "plaintiff" ought to mean, "every person asking relief against another person."

I have read the plaint and all the written statements since this case was last on, and the conclusion I have come to is that without doubt the plaintiff and the second defendant and defendants 9 to 14 must be considered as—to use a colloquial expression—being *in* the same boat, although no doubt defendants 9 to 14 are not *seeking* any relief possibly beyond that of the plaintiff and the second defendant; and, therefore, you have these two forces arrayed against each other—the plaintiff and the second defendant and defendants 9 to 14 against the other defendants in the suit.

Now I must come to the Code of Civil Procedure. Section 26 of the Code says:—"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action."

It appears to me that there was originally nothing to prevent the second defendant from joining the plaintiff in the plaint, and probably there was nothing to prevent defendants 9 to 14 from joining the second defendant and the plaintiff.

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by the Advocate-General and Mr. Padshah, as representing the other defendants who are opposing her.

For these reasons, it seems to me that I must rule that in this case the plaintiff and such of the defendants as support the plaintiff's case wholly or in part, must address the Court and call their evidence in the first place, and then, following the words of section 180 of the Code, the other party, namely the persons opposed to the plaintiff's case and that of the other defendants supporting her, must address the Court and call their evidence; and so the case must be proceeded with in a proper, legal and consistent manner.

Attorneys for the plaintiff:—*Messrs. Edgelow, Gulabchand, Wadia and Co.*

Attorneys for the defendant:—*Messrs. Payne and Co.* and *Messrs. Mehta and Dadachanji* and *Messrs. Pestonji, Rustim & Kolah* and *Messrs. Edgelow, Gulabchand, Wadia and Co.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908. *February 25.*

SONABAI, WIDOW, PLAINTIFF, v. TRIBHOWANDAS NAROTAMDAS MALVI AND OTHERS, DEFENDANTS, AND SONABAI, WIDOW, APPELLANT AND PLAINTIFF, v. TRIBHOWANDAS NAROTAMDAS MALVI, RESPONDENT AND DEFENDANT.*

Civil Procedure Code (Act XIV of 1882), section 380—Appeal lies from order under section 380, directing a woman to deposit security for costs—Such order is judgment under Letters Patent, clause 15—"Suit for money", what is.

An appeal lies against an order passed by a Judge sitting on the original side of the High Court requiring security from a woman under section 380, Civil Procedure Code. Such an order is a judgment within the meaning of clause 15 of the Letters Patent.

Seshagiri Row v. Nawab Askur Jung Aftab Dowla(1) followed.

* Suits Nos. 419 and 420, Appeals Nos. 1517, 1518.

(1) (1902) 26 Mad. 502.

Suits which are not exclusively for money, but which will result in a decree or money on the relief sought, come within the purview of section 380 of the Civil Procedure Code.

THESE were appeals against the orders made on Chamber summonses by Davar, J., directing the plaintiff to furnish security as required under section 380 of the Civil Procedure Code.

The plaintiff brought two suits against the defendant for a declaration *inter alia* that upon the death of Morarbhai's widow she was his reversionary heir and became entitled to his properties. The defendant took out Chamber summonses on the 18th October 1907, calling on the plaintiff to show cause "why she should not forthwith deposit with the Prothonotary of this Court, a sum of Rs. 3,000 by way of security for the first defendant's costs already incurred and likely to be incurred herein till the determination of the preliminary issue proposed to be tried."

Davar, J., ordered the plaintiff to deposit with the Prothonotary a sum of Rs. 1,000 as security for the first defendant's costs.

On appeal being filed against the orders the following judgment was written in compliance with Rule 281.

DAVAR, J.:—On the 18th October 1907, the first defendant obtained a summons in each of the above suits calling upon the plaintiff to show cause—

(1) Why discovery of the documents in the possession of the first defendant should not be postponed pending the trial of certain preliminary issues:

(2) Why certain preliminary issues should not be tried in the first instance: and

(3) Why the plaintiff should not be ordered to furnish security for the first defendant's costs.

The summons was in each case made absolute so far as the first two heads were concerned practically with the consent of all parties. The only discussion before me was as to the form of the issues and as to whether another issue proposed by the plaintiff should not also be ordered to be tried. That issue appeared to be unnecessary and I ordered the trial of two issues—directing the Prothonotary to set down the suit on some

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board for the trial of those issues on some day that may appear to him convenient. Against this portion of the order there is no appeal.

The third requisition of the summons was resisted by the plaintiff on the ground that these suits were not suits "for money."

The words "suit for money" in the second paragraph of section 380 of the Civil Procedure Code have led to endless discussion before the Chamber Judge ever since the paragraph was added to the section by Act VI of 1888. I am glad the plaintiff has appealed against my order on this head for this will give an opportunity to the Appeal Court to make a definite and authoritative pronouncement as to what is a "suit for money."

To be a "suit for money" must the suit be wholly and exclusively for money? If in a suit the plaintiff—a woman—claims moneys as well as something else—is she liable to be called upon to furnish security for the defendant's costs under the second paragraph of section 380 of the Civil Procedure Code or is she exempt from its operation by reason of the suit being for some relief other than a mere money claim? Is it enough if the suit is in substance for money to bring it within the operation of section 380 of the Code? Different Chamber Judges in our Courts have taken different views and astute draftsmen of plaints in which women have been plaintiffs have, in order to save the plaintiffs from having to furnish security for costs, often introduced a quite unnecessary prayer either for some unimportant or useless declaration or for a formal prayer for administration of an estate if necessary. There is no authoritative decision of our Court on this subject and the result is that whenever the question arises it leads to interminable arguments at the Bar.

In *Degumbari Debi* v. *Aushootosh Banerjee*(1) Mr. Justice Wilson held that a suit to recover moneys and certain specified articles or the value thereof was a suit for money within the terms of paragraph 2 of s. 380 of the Civil Procedure Code. He says the words "suit for money" has a wider meaning than a

(1) (1890) 17 Cal. 610.

"suit for debts" and that in considering the question whether a suit is for money the Court "must look at the substance." The effect of this judgment I take to be this: If a suit is substantially one to recover moneys from the defendant, it would be a suit for money within the meaning of the section.

In *Bai Porebai* v. *Devji Meghji* [1] Sir Charles Farran, our late Chief Justice, follows the Calcutta case. This was a suit to recover ornaments and clothes. In the course of his judgment the Chief Justice says:—"It is not denied that the suit is, in substance, a suit for money. The ruling upon this point in *Degumbari Debi* v. *Aushootosh*[2] has usually been followed in this Court."

In the case of *Bomanji* v. *Nusserwanji*[3] Mr. Justice Russell has gone a step further. In this case the plaintiffs were a father and his minor daughter and the claim was for money damages and for the return of certain presents made to the defendant at his betrothal with the second plaintiff. The plaintiffs were ordered to furnish security although one of the plaintiffs was a male and the other a minor female, both residents of Bombay, and the suit was partly for money and partly for recovery of presents made to the defendant.

In these two suits after a study of Exhibits B and B1 to the plaints, I came to the conclusion that these suits were substantially for money. It is true that in both these lists certain immoveable properties are mentioned, but it seems to me that the bulk of the property which the plaintiffs seek to recover in this suit consists of shares in mills, presses and other joint stock companies, Government Promissory Loan Notes, Municipal Debentures, deposits in companies and a very large quantity of ornaments and jewellery. The value of the immoveable properties was not mentioned to me, but it seemed to me looking at the list of moveable property that the value of the moveables must have been considerably in excess of the value of immoveable properties. If a claim for ornaments and clothes is substantially a claim for money, I can see no difference between ornaments and clothes on the one hand and liquid securities such as are

(1) (1898) 23 Bom. 100. (2) (1890) 17 Cal. 610.
(3) (1902) 27 Bom. 100.

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mentioned in lists B and B1 on the other hand. Just as the defendants in the suits mentioned above would have had, in the event of plaintiffs establishing their claims, to pay the money value thereof in the event of the ornaments and clothes not being forthcoming as observed by Mr. Justice Wilson in *Degumbari Debi* v. *Anshootosh* (*supra*) the defendants in these suits—in the event of the plaintiff succeeding—would have to make good the value of the securities if the securities were not forthcoming and pay moneys.

The section of the Code does not say that the suit should be *wholly* for money or even *substantially* for money and the view I take is that if the suit is one in which the *chief or principal relief* asked is the recovery of money or the recovery of moveable property, which if not produced by the defendant he would have to pay its money value, the suit is one for money and falls within the purview of the second paragraph of the section 380 of the Code.

The only other question for my consideration was: Ought I to exercise the discretion vested in me and make the order asked for against the plaintiff. I have always been most averse to making orders against women for depositing security for the defendant's costs when I find that such an order would embarrass them and hamper them in the conduct of their cases. In the cases of poor women such an order amounts to a denial of justice to them. Unless the suit is on the face of it vexatious or is one which I feel is filed merely for the harassment of the defendant I do not make an order against a woman plaintiff for security for defendant's costs—when she says she is not in a position to give such security and I believe her statement. In a large number of cases where *prima facie* a woman plaintiff is entitled to some of the reliefs she claims and the order against her for costs does not appear to be necessary for the reasonable protection of the defendant, the order is usually refused.

In these cases the plaintiff never alleged in her affidavit that she was not in a position to furnish security—in fact I asked her counsel and he said that that was not a ground on which she asked to be relieved from the operation of the section.

In *Bidhatree Dassee* v. *Mully Lall Ghose* (1) Mr. Justice Sale was of opinion that the Courts ought not to interfere unless it was shown that the exercise of its powers was necessary for the reasonable protection of the defendant.

In the present cases I come to the conclusion that under the circumstances disclosed in the affidavits of the first defendant and the plaintiff, an order for security of costs in each of these cases was necessary for the reasonable protection of the first defendant. The property which the plaintiff seeks to recover from the defendant in these suits was the subject of very heavy litigation in 1904. She is a member of the family to which the first defendant belongs. She could not possibly pretend that she did not know of this litigation. The litigation terminated by a consent decree in the early part of 1905. She lies by till June 1907 and then files these suits claiming the whole estate. She applies for injunction and for the appointment of a Receiver—an application which was evidently unjustifiable or unnecessary because Mr. Justice Macleod, who heard it, dismissed it, making her bear her own costs. Then she makes an application for an *ex parte* decree. This application is also refused and she is again made to bear her own costs. In defending himself the first defendant has incurred costs to the extent of Rs. 2,000. The plaintiff has no immoveable property. She has either moneys of her own or this litigation is financed by somebody else. The authorities are *prima facie* against her contention in the suits. Mr. Padshah said he relied on some Privy Council ruling which would assist his client's contention. He did not give me the reference nor did I desire to judge of the merits of her claim, but in the event of her losing the case and having to pay costs the first defendant has nothing tangible to look to for payment of his costs. She is vigorously fighting these cases and taking steps which add to the costs of this litigation. In my opinion the first defendant was entitled to ask the Court to protect him.

It must be remembered that the same Act (VI of 1888) which abolished imprisonment of women added the second paragraph

(1) (1894) 21 Cal. 832.

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to section 380 of the Code. Mr. Justice Sale in *Bidhatree Dassee* v. *Mutty Lall Ghose*[1] says, referring to section 380 :—

"The latter clause of the section was introduced by the Debtors Act (VI of 1888) which prohibits the arrest or imprisonment of a woman in execution of a decree for money." "The object of the section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realising their costs."

It appeared to me that in the event of costs being awarded against the plaintiff the first defendant would not be able to realise them unless security was given and feeling that for his reasonable protection the orders asked for were, under the circumstances, necessary I ordered the plaintiff to deposit security in each of these cases.

Against this order of Davar, J., the plaintiff filed an appeal on the following among other grounds :—

1. That the learned Judge erred in ordering the appellant to give security for the respondent's costs of this suit.

2. That the learned Judge erred in holding that the suit was a suit for money within the meaning of section 380 of the Civil Procedure Code.

3. The learned Judge should have held that this suit was not a suit for money and should not have made the said order and should have in any events dismissed that part of the said summons with costs.

4. The learned Judge erred in holding that the section did not require that the suit should be wholly or substantially for money.

Weldon, for the appellant.

Setalvad, for the respondent.

Setalvad :—No appeal lies here against the order appealed against as the order is not mentioned in section 588 of the Civil Procedure Code amongst the orders against which appeals do lie: *Lutf Ali Khan* v. *Asgur Reza*[2]. If the appeal is sought to be brought under the Letters Patent we submit that the judgment

(1) (1894) 21 Cal. 832 at p. 836. (2) (1890) 17 Cal. 455.

appealed from does not decide the rights and liabilities of the parties and so no appeal lies: *Kishen Pershad Panday* v. *Tiluckdhari Lall*[1]; *Mohabir Prosad Singh* v. *Adhikari Kunwar*[2]; *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[3].

Weldon:—An appeal lies in this case, see *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[4].

Setalvad:—It is clear from the plaint and its annextures that this is a suit for money. Among other property she claims specifically certain moneys, see Exhibit B 1 to the plaint. No doubt the claim comprises certain immoveable property, but the section does not restrict that the suit should be substantially for money, it only says, "suit for money" and does not mean that the suit should be exclusively for money and for nothing else.

The following authorities were also cited in course of argument. *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[5]; *Bai Porebai* v. *Devji Meghji*[6].

JENKINS, C. J.:—In favour of the competence of these appeals there is the direct authority of the Madras High Court in *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[4], and though much has been forcibly urged against this view, we ought, I think for the sake of uniformity, to accept this case as the basis of our decision and hold that an appeal lies.

Then had the learned Judge power under section 380 of the Civil Procedure Code to order the plaintiff to give security. Though the suits are not exclusively for money, each will, if the plaintiff succeeds, result in a decree for money on the relief sought, and I, therefore, think comes within the section, and there is no ground for holding that in making the orders under appeal the learned Judge exceeded the just limits of his discretion.

This appeal must, therefore, in each case be dismissed with costs.

(1) (1890) 18 Cal. 182.
(2) (1894) 21 Cal. 473.
(3) (1874) 13 Beng. L. R. 91.
(4) (1902) 23 Mad. 502.
(5) (1872) 8 Beng. L. R. 433.
(6) (1898) 23 Bom. 100.

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BATCHELOR, J.:—These are appeals from an order of Davar, J., requiring the plaintiff-appellant under section 380, Civil Procedure, Code, to deposit Rs. 3,000 as security for the first defendant's costs in these suits.

The first question to be decided is whether an appeal lies from the order. That depends upon the further question whether the order is a "judgment" within the meaning of clause 15 of the Letters Patent, for it is admitted that an appeal will not lie upon any other ground. The point has frequently been before the Courts, and, as I understand the decisions, the Courts have always professed to follow the ruling laid down in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.*[1], where it was said that "judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." It is unnecessary to refer to the numerous subsequent cases to which our attention has been called, for, as I have said, the test laid down above has been uniformly accepted. Reference must, however, be made to *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[2], where the operation of the rule was further explained by Sir Richard Couch, C. J. That was a case where leave had been given to the plaitiff under clause 12 of the Letters Patent to institute his suit in the High Court of Calcutta, and the question was raised whether an appeal lay from the order. The Chief Justice held that it did, observing that it was "not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them (sc. the parties), namely the right to sue in a particular Court." I am of opinion that this reasoning covers the case of the order now under discussion, for the effect of it is, at least conditionally, to deprive the Court of the jurisdiction which it otherwise would

(1) (1872) 8 Beng. L. R. 433 at p. 452. (2) (1874) 13 Beng. L. R. 91 at p. 101.

have to try the plaintiff's suit. No doubt, jurisdiction would be recovered on the plaintiff's making the prescribed deposit, but for the time being and unless this further step is taken, the order ousts the jurisdiction of the Court. For these reasons I think that the appeal is competent, and this finding is in conformity with the decision of the Madras High Court in *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla*[1].

There remains the question whether the suits are "suits for money" within the meaning of the second paragraph of section 380. The phrase is not one which lends itself to very precise definition, and the matter is somewhat complicated by the difficulty of ascertaining the exact object which the Legislature had in view in adding this clause to the section. The clause was added by the Debtors Act (VI of 1888) which also added section 245A prohibiting the arrest or imprisonment of a woman in execution of a decree for money; and it has been held that the reason of the rule was to make provision for the costs of a successful defendant as against a woman plaintiff: see for instance Sale, J.'s remarks in *In the goods of Premchand Moonshee*[2]. This explanation is not perhaps perfectly satisfactory, since it fails to account for the circumstance that the rule is restricted to suits for money. But I cannot discover that the Legislature had any other or further object than that ascribed to it by Mr. Justice Sale, and therefore in my opinion the rule should receive a liberal interpretation. This view is in conformity with previous decisions, of which I need only notice *Degumbari Debi* v. *Aushootosh Banerjee*[3], and *Bai Porebai* v. *Devji Meghji*[4]. Applying the rule to the case before us, I think that both suits should be regarded as suits for money. Money is involved in the prayers in the plaints, and a determination in the plaintiff's favour would entail a decree for money. Moreover, the two suits are closely connected, and while in one of them, Suit No. 1517, there is a claim for shares of the total face value of nearly Rs. 2½ lákhs, in the other, Suit No. 1518, there is a claim for large amounts of cash, including sums of Rs 30,000 and Rs. 24,000.

(1) (1903) 26 Mad. 502.
(2) (1894) 21 Cal. 832.
(3) (1890) 17 Cal. 613.
(4) (1898) 23 Bom. 100.

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It has not been argued before us that the learned Judge, if he had the power to make the orders under appeal, ought not to have made them: and upon the merits of the orders I entirely concur with Mr. Justice Davar.

I agree, therefore, that these appeals should be dismissed with costs.

Attorneys for the appellant: *Messrs. Ardeshir, Hormasjee, Dinshaw & Co.*

Attorneys for the respondent: *Messrs. Matubhai, Jamietram and Madan.*

B. N. L.

APPELLATE CIVIL.

Before Chief Justice Scott.

1908. *July 17.*

JYANI BEGAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. UMRAV BEGAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Widow—Dower—Remission effective without acceptance by the heirs of husband—Money spent for the benefit of another—Obligation to repay.

According to Mahomedan Law a dower is a debt and its remission by a widow without acceptance by the heirs of the husband is effective.

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises.

Ram Tuhul Singh v. *Biseswar Lall Sahoo*[1], and *Ruabon Steamship Company* v. *London Assurance*[2], referred to.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, modifying the decree of B. R. Mehendale, Joint Subordinate Judge of Násik.

The plaintiffs sued to recover possession by partition of their three-fourths share of the property described in the plaint as heirs of one Akbaralli from defendant 1, Akbaralli's widow and from her tenant, defendant 2, with past and future mesne profits.

* Second Appeal No. 725 of 1907.

[1] (1875) L. R. 2 I. A. 131. [2] [1900] A. C. 6 at p. 15.

Defendant 1 replied that the plaintiffs could not sue for partition without giving to the defendant at least Rs. 2,000 for her dower for which the property was liable and that certain moveable and immoveable property (a house and a garden) should be brought into hotch-pot.

Defendant 2 was absent.

The plaintiffs presented a counter-statement alleging that the house being out of repairs was re-built by the plaintiffs at the cost of about Rs. 500 to the knowledge of the defendant, that the defendant could not claim a share in the house as she never objected to the re-building, that the defendant would not be entitled to a share in the house without contributing to the expenses of the re-building, that the moveable property mentioned in the defendant's written statement was not in existence, that the garden was not the joint property of the parties, therefore, it was excluded from the suit, that the plaintiffs had defrayed the expenses of Akbaralli's obsequies for which his share was liable, that the defendant's claim to the dower was time-barred and that she had remitted her right to it at Akbaralli's death.

The Subordinate Judge found that the plaintiffs had a three-fourths share in the property in suit, that the defendant was entitled to her dower amounting to 40,000 Ashrafis (Rs. [illegible]), that her claim to the dower was time-barred and was not enforceable against the property in suit, that the house was liable to partition and plaintiffs had spent about Rs. [illegible] in improving it, that the defendant was liable to contribute Rs. [illegible] to the improvement, that the plaintiffs had expended about Rs. 100 on Akbaralli's obsequies and that the defendant should contribute Rs. 25 to those expenses. On these findings the Subordinate Judge passed the following decretal order:—

Defendant Umrao to pay to plaintiffs Rs. 75. Plaintiffs to get possession by partition of three fourth of the properties described in the plaint. The rest of plaintiffs' claim is disallowed.

On appeal by the defendant the Judge found that she was liable to contribute Rs. 25 to the expenses on account of the obsequies, that she was not liable to pay Rs. [illegible] on account of the re-building of the house because the house was re-built without

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her consent, and that she was entitled to Rs. 3,00,000 for her dower. The Judge, therefore, modified the decree as follows:—

Accordingly I must modify the order of the Lower Court by directing that the plaintiff on paying the Mahr less the obsequies expenses, that is, Rs. 2,99,975 recover three-fourth of the property in suit.

The Judge made the following observations with respect to the dower:—

The dower is the most important question. Defendant's dower was fixed at 40,000 Ashrafies, that is, Rs. 3,00,000. It is the custom of the Indians to fix such enormous dowers that their dignity may be increased and divorces rendered impracticable. It is tacitly understood that they are not to be paid. Nevertheless if demanded by the widow they must be paid unless there be an effectual remission.

Further though there is much conflict on the point the preferable opinion seems to be that the widow's dower is payable before the division of the estate so that the defendant in this case if her claim to dower subsists is entitled to retain the estate till her dower be paid. Moreover the claim is not time-barred as the time would run from the time when division was sought.

The question then is whether the dower was remitted. Dower can be remitted to the husband or his heirs and a remission to one heir is an effectual release of all. It is the form of gift known as "iskat" and remission must take place according to the ordinary rules for gifts.

The form given by the witnesses "I have given my dower for the sake of God and his apostle" savours of Sadak but in either case the rules are the same. What was given is a thing capable of Tamlik or Seizin and the gift is therefore incomplete unless one of the donees accepts it.

It is now necessary to see whether the defendant ever offered to surrender her dower, and if so, whether she did so by "gift."

The evidence certainly shows that she did pronounce the formula mentioned above thrice after the death of the deceased but it is not conclusively shown that such pronouncement was even in the presence of any of the heirs and it is not alleged that any of the heirs accepted that remission.

This being so the remission is ineffective. The estate is accordingly liable to a payment of Rs 3,00,000 less the amount spent on obsequies which is Rs. 25.

Plaintiffs preferred a second appeal.

N. A. Shirodkar for the appellants (plaintiffs):—The Judge found as a fact that the defendant remitted her claim to the dower after her husband's death. But he held that the remission was ineffectual as it was not accepted by the heirs of the deceased,

nor were any of the heirs present when the remission was made. We do not dispute this finding. What we submit is that accepting the finding the Judge's view of the law is erroneous. The principle of the remission of dower is based upon a text of the Koran: Sacred Books of the East, Vol. VI, p. 71; Ameer Alli's Mahomedan Law, 3rd edition, p. 109.

A widow's claim for dower is only a debt against the husband's estate. According to Mahomedan Law the remission of a debt extinguishes it and it is not necessary that there should be any acceptance of the remission on the part of the debtor: Ameer Alli's Mahomedan Law, 3rd edition, pp. 106, 107; Baillie's Mahomedan Law, Book VIII, Chap. III.

Next we contend that it was an error to absolve the defendant from contribution to the expenses relating to the house. We are entitled to it: section 70 of the Indian Contract Act; *Damodara Mudaliar* v. *Secretary of State for India*[1].

R. R. Desai, for the respondents (defendants):—The formula pronounced shows that the remission is in the form of a *Sadak* (religious gift). The Judge has also found to this effect No part of Mahomedan Law deals with remission. It is a part of Mahomedan Law of gift. A gift requires tender and seisin: Hidaya, p. 482. It is found that at the time of the remission the heirs of the husband were not present. The intention of the donor must be declared in the presence of the donee. In the case of *Sadak* seisin is necessary: Hedaya, p 489.

As regards the expenses in connection with the house, we submit that we are not *liable*. The house was always in plaintiff's possession. They repaired the house for their convenience without pressure on our part.

SCOTT, C. J.:—The plaintiffs sue the defendants to recover possession by partition of three-fourths of the property of one Akbaralli.

The 1st defendant, who is Akbaralli's widow, is in possession of some of the property of the deceased. The defendants are in possession of a house which forms part of the same estate.

(1) (1894) 18 Mad. 88.

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The plaintiffs' share in the inheritance is three-fourth; that of the defendant one-fourth.

The defendant *inter alia* pleaded that the plaintiffs could not sue for partition without the defendant receiving at least Rs. 2,000 for her dower for which she contended the property in her possession was liable.

Upon an issue "Whether the defendant was entitled to dower, and if so, to what amount" the Subordinate Judge found that she was entitled to 40,000 Ashrafis (Rs. 3,00,000) but that the claim was time-barred. He also held that the dower had been remitted by the defendant but doubted whether the remission was effectual. He passed a decree for the plaintiffs for three-fourth of the property mentioned in the plaint including the above-mentioned house which the plaintiffs sought to exclude from the actual partition.

The District Judge in dealing with the question of remission of dower says "the evidence certainly shows that she (defendant) did pronounce the formula mentioned above thrice after the death of the deceased but it is not conclusively shown that such pronouncement was even in the presence of any of the heirs and it is not alleged that any of the heirs accepted that remission. This being so, the remission is ineffective. The estate is accordingly liable to a payment of Rs. 3,00,000 less the amount spent on obsequies."

The only points argued before me were whether remission of dower by a widow without acceptance by the heirs of her husband was effective and whether the plaintiffs were entitled under section 70 of the Indian Contract Act to recover Rs. 50 from the defendant as her contribution to repairs effected by the plaintiffs to the house in their possession.

The recognized authorities on Mahomedan Law accessible to this Court all expressly recognise the right of a woman to remit her dower during the life-time of her husband (see Koran, Chapter III, para. 4, Sacred Books of the East, Vol. VI, p. 71; Hidayah, Vol. I, Book II, Chapter III; Baillie's Mahomedan Law, Book I, Chapter VII, section 10). Her right to remit dower after her husband's death is stated in Ameer Alli's Mahomedan

Law, 3rd Edition, Vol. I, p. 109, where it is said '"a woman may release her dower to her deceased husband" that is, the widow is entitled to exonerate or discharge the estate of her deceased husband from the liability for her dower debt.'

In considering whether dower can be remitted by a widow without acceptance by the husband's heirs it is necessary to refer to the Mahomedan Law on the subject of the extinction and transfer of debts, treating dower as a debt due by the deceased.

According to Mahomedan Law a debt remitted is a debt extinguished. No acceptance is required.

Baillie (Book VIII, Chapter III) citing Hidayah and Kifayah gives the following explanation "a debt considered with reference to the prospect of payment is *mal*, or corporeal property, and is susceptible of *tumleek*. Considered with reference to its present state, it is *wusf*, or quality (indebtedness), and is susceptible of *iskat*, or extinction. Hence a gift of it to the debtor himself, which is an extinction, is valid, both by analogy and on a favourable construction; but a gift of it to another, which is *tumleek*, is valid only on the latter ground."

This passage I understand to mean that an assignment of a debt to a third party is property capable of seizin and requires acceptance but a remission of a debt to a debtor results in its extinction. It is obvious that for the purpose of debt remission the heirs of a debtor must stand in the same position as the debtor himself.

To the above effect is a passage in Ameer Alli, 3rd Edition, at p. 107. Again on p. 106 of the same work it is said that the received doctrine is that even if the heirs of a debtor should reject a discharge of the debt, there would be no liability.

I therefore hold that the District Judge was not warranted by the Mahomedan Law in holding the remission of her dowry by the defendant to be ineffective.

In my opinion the point must be decided according to Mahomedan Law and not by reference to the provisions of the Indian Contract Act.

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It follows that the property is not liable to any lien for dowry and it is unnecessary to consider whether a lien for Rs. 3,00,000 should have been declared in a suit in which the defendant only claimed Rs. 2,000.

It remains to consider whether the plaintiffs are entitled to credit from the defendant for Rs. 50 in respect of repairs effected upon the house in their occupation. The facts as stated in the plaint are that the plaintiffs in their own right were entitled to 2¼ shares out of 3¼ shares in a house in Násik and as heirs of Akbaralli to ⅞ths of the remaining one share. Akbaralli died in 1897. The plaintiffs in 1898-99 effected repairs to the house which was old. (It does not appear whether the repairs were confined to the portion belonging to Akbaralli's heirs or extended to the whole 3¼ shares). The plaintiffs were and still are in exclusive possession of the whole house and seek to exclude Akbaralli's portion of it from partition in this suit though they say that "on the share in the house defendant's share is a charge." They allege that the defendant never objected to the repairs.

These facts do not justify the conclusion that the expenditure on repairs or any part of it was incurred 'for' the defendant so as to entitle the plaintiffs to claim compensation from her under section 70 of the Indian Contract Act.

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises: see *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[1], and *Ruabon Steamship Company* v. *London Assurance*[2].

I allow the appeal and set aside the decree of the District Judge and decree that the plaintiffs do recover by partition ⅞th of the property in the possession of the defendants and that the first defendant do recover by partition ⅛th of Akbaralli's portion of the Násik house No. 27/57 in the possession of the plaintiffs, that the defendant do pay Rs. 25 to the plaintiffs on account of expenditure on the obsequies of the deceased and that each party do bear their and her own costs throughout.

Decree set aside.

G. B. R.

(1) (1875) L. R. 2 I. A. 131.

(2) [1900] A. C. 6.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

RAMCHANDRA KRISHNA JOSHI AND OTHERS (ORIGINAL DEFENDANTS Nos. 1—5), APPELLANTS, *v.* GOPAL DHONDO JOSHI AND OTHERS (ORIGINAL PLAINTIFFS Nos. 1 AND 2 AND ORIGINAL DEFENDANT No. 7), RESPONDENTS.*

1908. *July* 20.

Hindu law—Adoption—Community of pravaras between the adoptive father and the natural mother of the adopted son—Difference in gotra—Limits to the rule that no one could be validly adopted whose mother the adopter could not have married in her maiden state—Nanda Pandita, authority of.

There were two *pravaras* out of three common between the natural mother of the adopted boy and the adopting father, though they belonged to different *gotras*. The parties were Chitpavan Brahmins of the Thána District The validity of the adoption was impugned on the ground that there could be no legal marriage between the adoptive father and the natural mother of the adopted son in her maiden state.

Held, upholding the adoption that the rule that "no one can be adopted whose mother the adopter could not have legally married" is confined to the specific instances of a daughter's son, a sister's son and the mother's sister's son.

Per BATCHELOR, *J.*—The authority of Nanda Pandita must be accepted except where it can be shown that he deviates from, or adds to the Smritis, or where his version of the law is opposed to such established custom as the Courts recognise.

SECOND appeal from the decision of C. C. Dutt, Joint Judge of Thána, confirming the decree passed by J. N. Bhatt, Subordinate Judge at Bhiwandi.

Suit for a declaration that plaintiff No. 1 was the adopted son of one Dhondo Gopal Joshi.

Dhondo Gopal Joshi died in 1878. After his death, his widow Laxmibai (plaintiff No. 2) was in possession and enjoyment of his property. She adopted the plaintiff No. 1 on the 9th November 1902.

The defendants were *bhaubandhs* of Dhondo. They resisted the plaintiff's claim on the ground that the adoption was not valid

* Second Appeal No. 480 of 1906.

according to law. The parties were Chitpavan Brahmins of the Thána District.

The Subordinate Judge decreed the plaintiff's claim, holding that the adoption was valid. The following were his reasons:—

"It is contended, however, that the adoption is invalid, because a legal marriage of the adoptive father with the natural mother of the adopted boy was not possible. Why? Not because they stand within the prohibited degrees of relationship or because they belong to the same gotras, but because they belong to two different gotras, amongst the members of which intermarriage is not allowed by Shastras........... No doubt some writers on Hindu law have favoured the theory of antagonistic gotras, but the same has not obtained any uniform approval amongst ancient writers and has not been accepted by Hindu law as prevailing at present, under which marriage between members of the same gotra also is legal, provided they are not sapinda relations and provided they do not stand within prohibited affinities Though Sagotraship is laid down as a bar to intermarriage in *Minakshi* v. *Ramnada*, 11 Mad. 49, the prohibition does not apply to this Presidency. Had it applied the decision in *Vyas Chimanlal* v. *Vyas Ramchandra*, I. L. R. 24 Bom. 473, would have been otherwise. There Asharam and Bai Mahakore whose son he adopted were Sagotras as appears from the pedigree at p. 474. The parties were Brahmins as in this case. Sapindaship and not Sagotraship was the test there applied to determine the validity of marriage and adoption. This ruling is, therefore, an authority for the proposition that a marriage between Sagotras is valid, provided the parties do not bear Sapinda relationship and provided they do not stand within prohibited affinities. The doctrine of antagonistic gotras cannot, therefore, be relied on when we see that Sagotraship even is not in itself a bar to intermarriage. The adoption in the present case is, therefore, not invalid."

On appeal this decree was confirmed by the District Judge for reasons which he stated as follows:—

"In disputing the legality of the adoption the appellants are unable to put forward any authoritative decision. I am asked to draw an analogy from *Minakshi's* case, I. L. R. 11 Mad. 49 and hold that the adoption cannot be valid unless the gotras and relationship are such that the adoptive father could have married the natural mother of the boy if she had been a maiden. This I am unable to hold as it is a general proposition which has not the sanction of authority in any way The Madras High Court in 11 Mad. 49 quoted above held the adoption of the son of the daughter of an agnate as invalid But even on this point the different High Courts do not agree Even the Madras High Court in I. L. R. 9 Mad. 44 held otherwise. In Bombay this prohibition did not obtain till 1879 when 3 Bom. 273 held the adoption by a Brahmin of his daughter's son as invalid. For the United Provinces, 11 All. 63 held the adoption by a Dakra Brahmin of his sister's son as valid. In the Full Bench case

of *Bhagwansing*, 17 All. 294, it was held by Edge, C. J., and most of the Judges, that the adoption of the daughter's son and the like is valid amongst the twice born castes. They also held that the rule of Nanda Pandita in Dattaka Mimansa to that effect ought not to be enforced and that it is at most recommendatory. Nanda Pandita himself does not clearly declare adoption of daughter's son, sister's son and mother's sister's son invalid. The earlier texts do not justify the rule laid down by Nanda Pandita. The rule is deduced from two texts of Saunaka and Sakala which are of doubtful meaning. It would be difficult to justify the rule from the Shastraic point of view for the fiction of adoption is not that the boy is begotten by the adoptive father on the boy's natural mother. From laws of inheritance, laws as to offering pindas in ceremonies, it is easy to see that the fiction is that the adoptive father has begotten the boy on the adoptive mother. Otherwise it is not easy to account for cutting off of all connections with the natural mother.

To sum up these—

(1) It has not been held uniformly that the adoption even of a daughter's son or a sister's son amongst Brahmins is invalid.

(2) Even if it had been so, it would be impossible to generalize and hold that the gotras, &c., should be such that the adoptive father could have validly begotten the boy on the natural mother, in her maidenhood.

In the absence of any such general rule the adoption in the present case cannot be held invalid merely because a shastri differs from the Nirnaya Sindhu that the two gotras (that of the adoptive father and natural mother when a maiden) are antagonistic. The gotras are Kashyapa and Shandilya. It has not been shown to me that there are any rulings to show that a marriage between antagonistic gotras is invalid. The mandates of the Nirnaya Sindhu most probably are recommendatory. In any case the marriage between Sagotras in the view of Hindu legislators must have been more objectionable than between antagonistic gotras. The High Courts have not taken a serious objection to the marriages between Sagotras. It cannot be said that such a marriage is not valid, even apart from the principal of *factum valet*. A marriage between Sagotras merely tends to reduce the social position and importance of the family concerned, and nothing more. I am, therefore, not in a position to think so seriously of the objection of antagonistic gotras as to hold that a marriage would be invalid or anything near it."

The defendant appealed to the High Court.

M. V. Bhat, for the appellant:—We base our objection to the validity of the adoption of plaintiff No. 1 in this case, on the ground that no valid marriage could take place between the adoptive father and the natural mother of the adopted son in her maiden state. These two though belonging to different *gotras* had

two out of three *pravaras* common. Their marriage would have been invalid according to the Mitakshara the bride and bridegroom differ from each other in *pindas*, *gotras* and *pravaras*. See also Nirnaya Sindu, Ch. III, p. 26; Dharma Sindu, p. 364; and Sarkar's Hindu Law (2nd Edn.), pp. 51—52. These commandments are positive; for it is a rule of Mimansa that where a text assigns no reason for a positive direction, it must be strictly obeyed.

To the procreation of a legitimate son, the existence of a prior legal marriage is necessary. Equally so, should be the possibility of a valid marriage between the adoptive father and the natural mother of the adopted son in her unmarried state, before a valid adoption could be made.

P. P. Khare, for the respondents:—The rule of law contended for by the other side is based on what Nanda Pandita has said in his Dattaka Mimansa and it has to be seen whether what he has said has been correctly translated, and whether it is mandatory or directory.

First, the words of Nanda Pandita are not correctly translated by Mr. Sutherland and, secondly, even accepting what Nanda Pandita has said in the original, he has exemplified his meaning by speaking of *viruddha sambandha* in the case of marriage. At the most, he can be said to have confined the restriction to a connection that would be incestuous; and he could not have meant to lay down the general proposition that is ascribed to him. Further, the rules of marriage are not imported into the law of adoption, and Nanda Pandita has not addressed his mind to what would be the effect if an adoption like this were to take place. The directions given by Nanda Pandita are at best only recommendatory.

BATCHELOR, J.:—The only question raised in this appeal is the pure question of law whether the first plaintiff is the validly adopted son of the deceased Dhondo. The validity of the adoption is impugned on the sole ground that there could be no legal marriage between the adopted boy's mother in her maiden state and the adoptive father, inasmuch as this mother and this father, though belonging to different *gotras*, had two out of three *pravaras* in common.

Pravaras are defined as illustrious *munis* or sages who contribute to the credit of a particular *gotra*. The *gotras* of the parties here are known as the Kashyapa and the Shandilya *gotras*. In the former the *pravaras* are Kashyapa, Avatsar and Naidhruva; and in the latter the *pravaras* are Kashyapa, Avatsar and Shandilya Thus Kashyapa and Avatsar are *pravaras* common to both *gotras*. The parties are Chitpavan Brahmans of the Thána District.

Now the appellants, if they are to succeed, must establish two distinct propositions, first, that no one can be adopted whose mother, as a maiden, could not have been legally married to the adopter, and, secondly, that in this case no legal marriage was possible between the boy's mother if unmarried, and the adopter by reason of the community of *pravaras* These two propositions rest on different authority and must be considered separately. In the view taken in the judgment of my learned colleague, which I have had the advantage of reading, the validity of the first of these two propositions does not fall to be determined, and for the purposes of this case I will assume that the identity of two out of three *pravaras* in the respective *gotras* of the bride and bridegroom would suffice to invalidate a marriage among Chitpavan Brahmans. Mr. Justice Chaubal has indicated some grounds for the belief that this is the state of the law, but as there is no evidence upon the record to prove that the principle cited from one passage in the Mitakshara has made its way into the accepted and approved usage of the people, I prefer to withhold a definite judgment upon the point.

Assuming, then, that the community of *pravaras* would have rendered a legal marriage impossible between the natural mother in her maiden state and the adoptive father, there remains the question whether that circumstance is by itself sufficient to invalidate the adoption. For it is not alleged that the adoption can be impeached on any other ground. In other words, the question is whether we should give effect to the rule ordinarily stated in the text books in the words "no one can be adopted whose mother the adopter could not have legally married," (Mayne, section 135, 6th Edn.). The rule has the authority

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of the Dattaka Mimamsa, and that authority, though it has been vigorously attacked by such writers as Mr. Mandlik and Golap Chándra Sarkar Shastri, has been largely rehabilitated by the Privy Council in *Bhagwan Singh's* case[1]. The present position appears to be that the authority of Nanda Pandita must be accepted except where it can be shown that he deviates from, or adds to, the Smritis, or where his version of the law is opposed to such established custom as the Courts recognise. It must be conceded further that, as Mr. Mayne points out, the rule under consideration "has been affirmed by a singularly strong series of authorities in all parts of India as forbidding the adoption of the son of a daughter, or of a sister, or of an aunt." And the rule upon the precise point of requiring the possibility of a legal marriage was approved by the High Court of Madras in the Full Bench decision in *Minakshi* v. *Ramananda*[2], though the effect of this decision is somewhat weakened by the subsequent case of *Ragavendra Rau* v. *Jayaram Rau*[3]. While, then, the rule now under notice falls strictly outside the decision of the Judicial Committee in *Bhagwan Singh's* case, yet it derives some countenance from the principle of that decision, and receives so much support *aliunde* that if it could be unquestionably ascribed to Nanda Pandita, I for my part should find difficulty in setting it aside. But the argument for the respondents need not go so far as this; and the strength of their case is that, though the Court may perhaps be bound by a real gloss of Nanda Pandita's, it is not bound by a mere mistranslation of his gloss. That, no doubt, is so; and it remains to notice the origin of the rule. This has been done so exhaustively by my learned colleague that I shall content myself with very few words in explanation of my agreement. The important passage occurs in paras. 16 to 20 of section V of the Dattaka Mimamsa. That section purports to be devoted to "The mode of adoption; form; by whom propounded; necessity of observance; effect of omission," and as there is a special section number II, with the title "who is to be adopted?", and section IV with the title "The qualification of the person to be adopted," any authoritative pronouncement

(1) (1899) L.R. 26 I.A. 153.   (2) (1887) 11 Mad. 49.
(3) (1897) 20 Mad. 283.

upon the subject of fitness for adoption would logically be expected in section II or section IV, and not in section V. This consideration is entitled to some weight, though I do not pretend that an argument from logical arrangement is by any means conclusive when applied to the Dattaka Mimamsa. Then, taking the relevant paragraphs in section V as they stand, we find, first, a deduction from Saunaka's expression that the boy should be, or is become, the reflection (more literally, the shadow) of a son. By virtue of this deduction certain specified relatives are prohibited or excluded, that is, as being incapable of having sprung from the adopter himself through appointment to raise issue on another's wife (*niyoga*) "and so forth." Then the author passes to the connected subject of prohibition by reason of "prohibited connexion." Here he cites the Grihya Parishishta and proceeds (para. 19) himself to define this expression in these words: "Where the relation of the couple, that is, of the bride and bridegroom, bears analogy to that of father or mother; if the bridegroom be, as it were, father of the bride, or the bride stand in the light of mother to the bridegroom, such a marriage is a prohibited connexion." Paragraph 20 lays down that this prohibition, though of direct application to marriage only, must be imported into the law of adoption, so that no one may be adopted who, upon adoption, would become the "son of prohibited connexion", "in other words," says the author, "such person is to be adopted as with the mother of whom the adopter might have carnal knowledge." From the author's own explanation and from the words themselves I am of opinion that "prohibited connexion" is confined to that particular illicit relation which in English is known as incest. The Sanskrit words are *viruddha sambandha*, and *viruddha* does not mean "prohibited," but "opposed to, contrary to," the *subaudiendum* being, in my judgment, nature or the instinct of morality. Thus, what we are asked to do is to extend certain peculiar and specific restrictions which on their face purport to be limited to cases of *niyoga* and incest so that they shall embrace and include all the complicated restrictions applicable to marriage. In my opinion that cannot be done. The word marriage nowhere appears in the author's treatise but occurs only in the translator's

note where he suggests expanding the words "through an appointment or so forth" into "by such an appointment, or marriage, and the like." But this rather free process of reasoning by inference or analogy would be somewhat dangerous if applied to the ordered system of English Law, and has, I think, no application to such a treatise as the Dattaka Mimamsa. It may be added that this restriction of the meaning of *viruddha sambandha* to incest was approved by the Full Bench of the High Court of Madras in *Minakshi* v. *Ramananda*[1].

Moreover, if it had been the intention of Nanda Pandita to import bodily into the law of adoption all existing marriage restrictions, he would presumably have done so in a single sentence, instead of elaborating two particular cases of minor consequence and leaving the general subject to be, as it were surreptitiously, introduced under cover of the mere aside, "and so forth."

For these reasons I am of opinion that the adoption of the first plaintiff was a good adoption and that the decree under appeal should be confirmed.

CHANDAVARKAR, J.:—In so far as any question is raised as to the possibility of a legal marriage in the present case between the mother of the adopted boy in her maiden state, and the adoptive father, I am of opinion, at least in the present state of the record, that the admitted identity of the two Pravaras in the Kashyapa and Shandilya Gotras, was fatal to the validity of such a marriage; and if it had been necessary that a question of this importance should be decided in this case, I should have proposed to send down an issue for a finding as to the usage in the community after formally recording legal evidence as to custom.

On this point I consider it sufficient at present to say that the Mitakshara is quite explicit. For Vijnyaneshwar in his comment on the Smriti of Yajnavalkya says:—

"असमानार्षगोत्रजाम् what pertains to a Rishi (ऋषि) is Arsh (आर्ष) which in effect means Pravara (प्रवर). Gotra (गोत्र) (family name) what is well-known in the family from generation to

(1) (1887) 11 Mad. 49 at p. 53.

generation. आर्ष and गोत्र (when compounded in the Dwandva (द्वन्द्व) form become 'arshgotre' (आर्षगोत्रे). He whose Arsh (आर्ष) and Gotra (गोत्र) are the same (as those of another) is 'samanarsh-gotra' (समानार्षगोत्र); a girl born of such a person is 'samanarsha-gotraja' (समानार्षगोत्रजा); and one not so born is 'asamanarsha-gotraja' (असमानार्षगोत्रजा). Gotra (गोत्र) and Pravara (प्रवर) are *separate causes of prohibition.* Therefore the girl must be 'asamanagotraja' *i. e.*, of a different Gotra, and 'asamanarshaja' *i.e.*, of a different Pravara."

"The term 'asamanapravara' implies a prohibition (of marriage with a girl) having the same Pravara, though she may not be a 'sapinda' nor a 'sagotra.' The term 'asapinda' is applicable to all castes, there being 'sapindya' (सापिण्ड्य) in the case of all persons. The term 'asamanarsha-gotraja' applies only to the three higher castes. Though Khatriyas and Vaishyas have no 'gotra' of their own, the 'gotra' and 'pravara' of their family priests should be considered (as belonging to them)." Then follows the important passage :—

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव नोत्पद्यते ।
रोगिण्यादिषु तु भार्यात्वे उत्पन्नेऽपि दृष्टविरोध एव ।

i. e., "in the case of marriage with girls who are 'sapinda,' 'samangotra' or 'samanpravara' *the condition of wifehood itself does not come into being*; while in the case of girls who are afflicted with disease and other like girls, *the condition of wifehood does come into being*, but there is a conflict in regard to wordly considerations only." Mitakshara, Bapushastri Moghe's Edition, pp 13-14

This is the construction put upon Yajnavalkya's text by the Mitakshara, which is the paramount authority in Western India; and so far as I am aware, notwithstanding the observations of the late Rav Saheb Mandlik in his work on Hindu Law at p. 414, these restrictions are respected and observed in practice among the three higher classes. There may be cases of an unconscious infringement of the rule, and the provision for these in the Shastras to my mind only emphasises the binding character of the rule.

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A reference to the Nirnayasindhu, Chapter III, p. 26, and the Dharmasindhu (Nirnaya Sagar Edition, p. 364) (which though a recent publication is entirely based on the former) shows that no distinction can be taken on the score of the sameness or identity obtaining only in one or more Pravaras. Even if one Pravara is common to any two Gotras, intermarriage is forbidden, and there is elaborate mention as to which Gotras are consistent for marriage. In the Dharmasindhu, in the portion of the book treating of this subject at p. 373 it will be found under the information given about Kashyapagana, that persons from these two Gotras, Kashyapa and Shandilya, cannot intermarry; they are strictly not different Gotras at all.

It was indeed urged by Mr. Khare that the Shastras provide for a penance in case such connection happens to be unconsciously formed, and that there is no provision for dissolution of marriage. But dissolution of a completed marriage among the three regenerate classes in the sense of the girl being regarded as fit or eligible for a fresh marriage is, I think, not known to Hindu Law. The girl so married remains in the family—but it is distinctly provided that she must be abandoned as a wife, and has to be maintained as a mother. The penance ordained is nowhere regarded as a process of validating the marriage, and is evidently a religious observance prescribed as an atonement for the religious taint involved in such a connection. Besides, this penance is prescribed alike for infringements of the Sagotra and Sapinda prohibitions and not limited to that of "samanpravaras" only.

I therefore conclude that the validity or invalidity of the marriage tie in cases of this kind must be determined under the original text of Yajnavalkya as authoritatively interpreted by Vijnyaneshwar in the Mitakshara. I can conceive that deviations from any prescribed rule may obtain in practice and that the frequency of such deviations in any particular community may in course of time have established a recognised and binding usage or custom: and where such is established, it would no doubt be the duty of our Courts to give effect to it, if otherwise legal and valid. But the onus of establishing such usage would be heavily upon the party asserting it. In the present case I do

not find that the respondent-plaintiffs set up any such usage—far less can any be held proved.

While, therefore, on this point I am of opinion that a legal marriage between the adopting father and the natural mother of the adopted boy would be invalid according to Hindu Law, I am not prepared to accept the position, that the invalidity of such a connection is necessarily a ground for holding the plaintiff's adoption to be invalid. This alleged invalidity is based on the proposition which is roughly and broadly stated in English text-books on Hindu Law, and in some decisions of our Courts, that a boy whose natural mother the adoptive father could not have legally married in her maiden state is ineligible for adoption. It will be presently shown that this broad statement rests purely on an inaccurate rendering by Mr. Sutherland of a passage in the Dattaka Mímansa of Nanda Pandita. I am aware that the objections to the strained logic with which he tries to support the innovations sought to be introduced by him have lost much of their proper force and propriety owing to the decision of their Lordships of the Judicial Committee in the case of *Bhagwan Singh* v. *Bhagwan Singh*[1]. I take it, as the Privy Council observe in *Sri Balusu* v. *Sri Balusu*[2] that its authority is not "open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence." But the ground on which this respect for its authority is based by their Lordships is expressly stated to be that "such treatment would not allow for the effect which long acceptance of written opinions has upon social customs": and they further observe that caution is required in accepting its glosses where they deviate from or add to the Smritis. And in the case of the adoption of an only son, their Lordships held in the case of *Sri Balusu*, noticed above, that the prohibition against the adoption of an only son mentioned in section IV of the Dattaka Mimansa was only to be treated as recommendatory and not mandatory. It is section II of the work which treats about "who is to be adopted": and the prohibition as to the adoption of a mother's sister's son, occuring in that section, along with the sister's son and the daughter's son has been up-

(1) (1899) L. R. 26 I. A. 153. (2) (1899) L. R. 26 I. A. 113 at p. 132.

held as mandatory in *Bhagwan Singh's* case. This case, therefore, does not decide anything as to any implied prohibitions spelt out of Shaunaka's text "putrachhaya-vaham" in section V of the work which relates strictly to the mode of adoption. It is an open question and would be decided, I think, on a consideration of whether Nanda Pandita's written opinion on the point has been long accepted and recognised in social customs.

But in the present case before us, it is not necessary to dispute the binding force of Nanda Pandita's gloss. I am clearly of opinion that he never contemplated any such wide and broad prohibition as is contended for by the appellants. It appears to me that the whole misapprehension of his meaning is due to an unhappy rendering of the expression Virudha Sambandha (विरुद्ध संबंध) into English as "prohibited connection." Owing to the early translation of this treatise into English, English Judges naturally construed the expression as referring to all the prohibitions for a legal marriage contemplated or prescribed by the Hindu law: and they are thus sought to be forced on a marriage which has to be assumed for the purposes of a legal fiction.

The prohibitions for a legal marriage will be found summarised in Golap Chandra Sarkar's Hindu Law (2nd Edn.) at p. 65.

These are shortly stated:—

1st. The rule of exogamy—that a man cannot marry a girl of the same Gotra or Pravara.

2nd. The rule of consanguinity, *i. e.*, a man cannot marry a girl who is a cognate relation of the descriptions given. This may be called the rule of Sapindaship.

3rd. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the step-mother's sister, her brother's daughter, and his daughter's daughter; the paternal uncle's wife's sister, and the wife's sister's daughter, and the preceptor's daughter.

It is this third rule with which we are concerned. Golap Chandra Sarkar has pointed out that this third prohibition appears

to be of moral obligation only, since it is not respected. It is the third prohibition referred to by the Madras High Court in *Minakshi* v. *Ramanada*[1], and stated to be the rule of Virudha Sambandha. A later judgment of the same High Court in *Ragavendra Rau* v. *Jayaram Rau*[2] decides that this prohibition of Virudha Sambandha was only hortatory and the marriage of a Hindu with his wife's sister's daughter was valid.

Now taking Nanda Pandita's gloss as translated by Mr. Sutherland—but noting that the expression for "prohibited connection" in the original is only "Viruddha Sambandha," it will be seen that Nanda Pandita himself defines what "Viruddha Sambandha" is. Viruddha Sambandha is "where the relation of the couple, that is of the bride and bridegroom, bears analogy to that of father or mother: if the bridegroom be, as it were, father of the bride, or, the bride stand in the light of mother to the bridegroom, such as the daughter of the wife's sister and the sister of the paternal uncle's wife," (see section V, para. 19); and this is stated to be from the "Grihya-Parishishta" of Aswalayana. Having so defined Viruddha *Sambandha*, para. 20 goes on to say that a boy, who if begotten by the adopter would have been the son from a "Viruddha Sambandha" as mentioned above from the text of the Grihya-Parishishta on marriage, should not be adopted: and then come the words

तथा प्रकृते विरुद्धसंबंधपुत्रो वर्जनीय इति, यतो रतियोगः
सम्भवति तादृश· कार्यं इति यावत्।

i. e., so in the present instance a son born of a connection by Viruddha Sambandha (defined as above) is to be eschewed: that is (such a son) should be made in respect of whose birth carnal knowledge would be allowable (between the natural mother and the adopting father). This clearly brings in the idea of a carnal knowledge contrary to nature, *i. e.* incest. I, therefore, think Nanda Pandita must be taken in his gloss to take exception to the adoption of the persons specifically mentioned by him in para. 17 and to the cases of Viruddha Sambandha mentioned in the subsequent paras. 18 and 19. This interpretation is natural

(1) (1887) 11 Mad. 49 at p. 53 (2) (1897) 20 Mad. 283.

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and does not violate any of the accepted canons of construction. It accords with the natural human instinct in the act of adoption by which one desires to affiliate a close blood relation. The rule of exogamy mentioned above or of consanguinity and Sapindaship as prescribed for marriage have no natural application or relevancy to the law of adoption. On the contrary in the order of selection for adoption the first choice is directed in favour of a Sapinda, failing him a Sagotra, and in default of these a stranger, excepting always the specific instances mentioned, viz., a daughter's son, a sister's son, and the mother's sister's son.

Coming now to the reported cases, I have already stated that the Privy Council Ruling in *Bhagwan Singh* v. *Bhagwan Singh*[1] refers to the specially excepted case of mother's sister's son and has no application here. The only case in which effect has been given to the rule as broadly stated at the starting is the case of *Minakshi* v. *Ramanada*[2]. But as I have noticed above this decision did not preclude the same Court deciding in the subsequent case of *Ragavendra Rau* v. *Jayaram Rau*[3] that the prohibition of Viruddha Sambandha as given in the Grihya-Parishishta, and the Dattaka Mimansa was only hortatory and not mandatory: and that case expressly decided that the adoption of a wife's sister's son was valid. There is further a decision of our Court (*Vyas Chimanlal* v. *Vyas Ramchandra*[4]) where the objection taken to the adoption as stated in the appellant's pleader's argument was that the natural mother and the adoptive father were Sagotra Sapindas, and the case of *Minakshi* v. *Ramanada*[2] was cited, see p. 476. The late Mr. Justice Ranade seems clearly to confine the text of Shakala to the specified instances only, *i. e.* daughter's son, sister's son and the son of the mother's sister. It is difficult to assume that the fact of the natural mother and adoptive father being Sagotras should not have been present to a Brahman Judge and scholar of Justice Ranade's reputation: and it thus appears to me that the case of *Vyas Chimanlal* goes further than the present case. For Ranade, J., evidently considers the restrictions evolved by Nanda Pandita out of "putrachhaya" to be simply recommenda-

(1) (1899) L. R. 26 I. A. 153.
(2) (1887) 11 Mad. 49.
(3) (1897) 20 Mad. 283.
(4) (1899) 24 Bom. 473.

tory. He says "the essential idea is that the boy should have the resemblance of a son, which really means that he should be of the same class and Gotra, if possible, but, just as more distant and even Asagotra sons may be adopted, the son of Mahakor, who was the daughter of a distant cousin seven degrees removed, was not ineligible for adoption by the widow of Asharam. None of the cases decided have gone the length of prohibiting adoption, except as stated above, in the case of direct relations as daughter's and sister's sons, etc, among the higher castes." Following these cases *Vyas Chimanlal* v. *Vyas Ramchandra*[1] and *Ragavendra* v. *Jayaram Rau*[2] I would hold, if the present case fell under the gloss of Nanda Pandita on the text "Putrachhaya-vaham," that the restrictions therein were only recommendatory: but I have already stated my reasons for holding that that gloss only contemplates the specific cases of Viruddha Sambandha mentioned, and it is not contended that the connection between plaintiff 1's natural mother and the adopting father would have been of that character.

For these reasons I hold the plaintiff No. 1's adoption to be valid according to Hindu Law and concur in confirming the decree under appeal with costs.

Decree confirmed.

R. R.

(1) (1899) 24 Bom. 473 at p. 481. (2) (1897) 20 Mad 283

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

1908.
July 23.

LAXMI KOM TATYA (ORIGINAL OPPONENT), APPELLANT, *v.* ABA BIN APAJI AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

Bombay Civil Courts Act (XIV of 1869), section 16—Amending Act (Bombay Act I of 1900), section 2—Probate and Administration Act (V of 1881), sections 51, 52 and 86—Indian Councils Act, 1892, section 5 ; 55 and 56 Vic., c. 14—Application for probate—Value of the subject-matter not exceeding Rs. 5,000—Order of the Assistant Judge—Appeal—District Judge—Jurisdiction.

The Probate and Administration Act (V of 1881) being made by an authority in India is subject to the powers of repeal and amendment granted to the Local Legislature by section 5 of the Indian Councils Act, 1892, 55 and 56 Vic, c. 14. Therefore the provision of the Bombay Civil Courts Act (XIV of 1869) by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs. 5,000 will lie to the District Court is one which the Local Legislature was competent to make. In so far as the provisions of the Probate and Administration Act are inconsistent with those of the amendments introduced into the Bombay Civil Courts Act by Bombay Act I of 1900, the provisions of the first mentioned Act must be taken to have been impliedly repealed for this Presidency.

SECOND appeal from an order passed by S. J. Murphy, Assistant Judge of Sátára, in a proceeding for probate.

One Tatia bin Apaji Patil died on the 20th November 1905 after having made a will dated the 15th November 1905. The deceased left him surviving his widow Laxmi. The property of the deceased consisted of some lands, a house and some moveables and was in all worth about Rs. 500. In the year 1906 Aba bin Apaji Patil and Nanu bin Patlu Patil, brother and nephew respectively of the deceased Tatia, applied for probate of his will alleging that out of the property left by the testator, the house and the moveables worth about Rs. 100 were in the possession of his widow Laxmi for whose maintenance a provision had been made in the will, that the testator left no issue, male or female, and that the applicants were the executors named in the will.

* Appeal No. 163 of 1906.

The opponent Laxmi contended that the deceased left no will and that the will produced by the applicants was a forgery, that she on the 3rd January 1906 adopted one Sakharam, she being authorized by her husband to make an adoption, and that the applicants had no right to the property of the deceased under the forged will.

The Assistant Judge found that the will produced by the applicants was proved and granted their application for probate.

Against the said order the opponent Laxmi preferred an appeal to the High Court.

K. H. Kelkar appeared for the appellant (opponent).

K. N. Koyaji appeared for the respondents (applicants):—We raise a preliminary objection, namely, that the appeal cannot lie to this Court in the first instance. The order appealed against was passed by the Assistant Judge at Sátára and under section 16 of the Bombay Civil Courts Act of 1869, as amended by section 2 of Bombay Act I of 1900, an appeal would lie to the District Judge and not to the High Court as the value of the subject matter does not exceed Rs. 5,000.

K. H. Kelkar for the appellant (opponent):—Section 86 of the Probate and Administration Act requires that an appeal like the present should be preferred to the High Court. Section 51 of the same Act vests in the District Judge alone the jurisdiction to grant probates or letters of administration and section 52 empowers the High Court to appoint delegates to act for the District Judge in such matters; and from the District Judge or the Delegates an appeal lies only to the High Court. Besides, the Local Legislature could not alter an enactment passed by the Imperial Legislature, nor could the Local Legislature affect or curtail the powers of the High Court.

[Scott, C. J.:—Referred to *Premshankar Raghunathji* v. *The Government of Bombay* [1] and *The Collector of Thána* v. *Bhaskar Mahadev Sheth*[2].]

We submit that these authorities are in our favour.

(1) (1871) 8 Bom. H. C. R., A. C. J., 195. (2) (1884) 8 Bom. 264.

1908.

LAXMI v. ABA.

Koyaji, in reply:—The above rulings support our contention. Here no imperial statute is affected by the Local Legislature. The Probate and Administration Act of 1881 does not make any provision for appeals from orders of Assistant Judges. The Local Legislature has made such a provision. The ruling in *Premshankar Raghunathji* v. *The Government of Bombay* [1] shows that the possibility of the appellate powers of the High Court being curtailed cannot be held to "affect the provisions" of the Statute constituting the High Court. The Local Legislature besides has the right to repeal or to amend the Acts passed by the Governor General in Council, see section 5 of the Indian Councils Act, 1892, 55 and 56 Vic., c. 14.

SCOTT, C. J.:—This is an appeal from a decision in a probate matter come to by the Assistant Judge of Sátára.

The appeal is brought directly to this Court from that Judge and the preliminary objection has been taken on behalf of the respondent that no appeal lies to this Court in the first instance by reason of the provisions of section 16 of the Bombay Civil Courts Act XIV of 1869, as amended by Bombay Act I of 1900, section 2. That section as amended runs as follows:—"The District Judge may refer to any Assistant Judge subordinate to him original suits of which the subject-matter does not amount to ten thousand rupees in amount or value, applications or references under special Acts and miscellaneous applications not being of the nature of appeals. The Assistant Judge shall have jurisdiction to try such suits and to dispose of such applications or references. Where the Assistant Judge's decrees and orders in such cases are appealable, th appeal shall lie to the District Judge or to the High Court according as the amount or value of the subject-matter does not exceed or exceeds five thousand rupees."

It is admitted that the value of the subject-matter, that is, of the estate which is the subject of the probate application in this case, does not exceed Rs 5,000, so that if the provisions of section 16 of the Bombay Civil Courts Act have to be applied, the appeal lies from the Assistant Judge to the District Judge and not to the High Court.

(1) (1871) 8 Bom. H. C. R., A. C. J., 195.

For the appellant it has been argued that under the Probate and Administration Act V of 1881, section 86, "Every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals"; and reference is also made to sections 51 and 52 of that Act to establish that the District Judge alone had jurisdiction in the granting of probate in this case.

We think however that the amendment of section 16 of the Bombay Civil Courts Act which applied the provisions of that section to applications or references under special Acts, of which the Probate and Administration Act is one, was within the competence of the Local Legislature; for, it is provided by section 5 of the Indian Councils Act of 1892, 55 and 56 Victoria, chapter 14, that the Local Legislature of any Province in India may, with the previous sanction of the Governor-General, repeal or amend as for that Province any law made either before or after the passing of that Act by any authority in India other than that Local Legislature. Therefore, the Probate and Administration Act being a law made by an authority in India, was subject to the powers of repeal or amendment granted to the Local Legislature by the section which we have referred to; and the provision of the Bombay Civil Courts Act by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs 5,000, will lie to the District Court, is one which the Local Legislature was competent to make. In so far as the provisions of the Probate and Administration Act are inconsistent with those of the amendments introduced into the Bombay Civil Courts Act by Bombay Act I of 1900, the provisions of the first mentioned Act must be taken to have been impliedly repealed for this Presidency.

We, therefore, think that the preliminary objection is a good one, that the appeal in this case lies to the District Judge and not to the High Court in the first instance, and that we must, therefore, return the appeal to be presented to the proper Court.

The appellant must pay the costs of this appeal.

Appeal returned for presentation to proper Court.

G. B. R.

Registered No. B. 2.

GENERAL INDEX, TITLE, &c.,

TO THE

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CORRIGENDUM.

(I. L. R. 32 Bom.)

Page 74, last line, *for* "*Gadadharbhat* v. *Chandrabhagabai* (5)" *read* "*Gadadharbhat* v *Chandrabhagabai* (*supra*)".

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a living Hindu debtor.

Bai Meherbai v. *Maganchand* (1904) 29 Bom. 96, explained.

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CASES—

CHARITY—*Will—Gift to charitable purpose—Unnecessary and useless object—Cy-pres doctrine—Trust incapable of being carried out at testator's death—Diversion of funds to useful and beneficial purpose—Power of Court.*] On the authority of *In re Campden Charities* (1881) 18 Ch. D. 310 and of other cases it is

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Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidences adduced before the Court.

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CIVIL COURTS ACT (XIV OF 1869), SEC. 16.

See BOMBAY CIVIL COURTS ACT 631

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 11—*Suit of a civil nature—Administration suit—Estate belonging to a living Hindu debtor—Competency to entertain the suit.*] A Civil Court cannot entertain a suit brought to administer the estate belonging to a living Hindu debtor.

Bai Meherbai v. *Maganchand* (1904) 29 Bom. 96, explained.

GANGARAM *v.* NAGINDAS ... ... (1908) 32 Bom. 381

——— SEC. 13—*Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 20—Suit on a promissory note—Issue as to payment by instalments—Finding in the negative—Extension of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for instalments*—Res judicata.] In a suit instituted in the Court of the First Class Subordinate Judge of Ahmedabad on a promissory note an issue was raised as to whether the amount sued for should be made payable by instalments and the ... 1905. The ... ned- ... plied ... the question of instalments was *res judicata.*

Held, that section 13 of the Civil Procedure Code (Act XIV of 1882) was not ... 1879) ... low of ...

BAI DIWALI *v.* PATEL GIRDHAR ... ... (1908) 32 Bom. 391

——— SEC. 13, EXPL. II—Res judicata—*Property not included in the former suit—Right as heir decided in the former ... erty—The decision does not bar the second ...* ... and others to recover some property as hei... of the properties specified in the plaint and ... erein. A. denied K.'s heirship and asserte... ecided that A. was the heir of S. and the suit was dismissed.

A. then br... his right as S.'s heir to property not ... The lower appellate Court negatived the ... to make the omission by K. to in... previous suit for partition a ground of defence, A.'s right to the property was in the second suit barred under Explanation II to section 13 of the Code of Civil Procedure (Act XIV of 1882).

Page

the application; and the dismissal
second appeal a preliminary objec-
application fell under section 312

Held, that the application did not fall under section 311 and the order dismissing the same did not come within section 312 of the Code

Held, further, that the order fell under section 244 (*c*) of the Code and was appealable as a decree. The question involved was "a question relating to the satisfaction of the decree" within the meaning of the clause

regularity
11 of the
y in pro-

The words "publishing or conducting" in section 311 of the Code refer respectively to the proclamation of sale under section 287 and to the action of the officer by whom the sale was held

The sale took place eight years after the decree.

Held, that as no notice was issued to the appallent the order of both the lower Courts must be reversed and the sale set aside.

PARASHRAM *v.* BALMUKUND ... ... (1908) 32 Bom. 572

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 335—*Limitation Act (XV of 1877), Sch II, Art. 11—Purchasers at Court-sale—Obstruction to delivery of possession—Obstructor manager of joint family*

Held, on second appeal by plaintiff 1 that the suit was not time-barred under Article 11, Schedule II, of the Limitation Act (XV of 1877) as the minors were not "efficiently represented."

Padmakar Vinayak Joshi v. Mahadev Krishna Joshi (1885) 10 Bom. 21, followed.

The withdrawal of V. by default from the obstruction proceedings was designed by him (as appeared from the circumstances) in order to deprive the minors of

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Per BATCHELOR, J.:—It has been warmly urged that the third party's right

contract unless the principal, hitherto undisclosed, comes out into the open and claims the benefit of the contract for himself, and there would be no hardship in requiring the third party to challenge the alleged principal as to whether he makes this claim or not.

of another—Obligation to repay.]
benefited by the money of another

Ram Tuhul Singh v *Biseswar Lall Sahoo* (1875) L. R. 2 I A. 131 and *Ruabon Steamship Company* v. *London Assurance* [1900] A. C. 6 at p. 15, referred to.

CONVEYANCE—*Stamp Act (II of 1899) art. 23—Pressing factory—Partnership —Transfer ... a certain sum—Document—Release—*
by a document, the executing party,
in a going pressing factory, transfers
the other person interested in the factory
document is a conveyance on sale of
property.

CORPORATION—*Common law right of member of corporation to inspect books of the corporation.*

COSTS—*Application for enforcement of payment of costs by a solicitor against his client is not an application under the Civil Procedure Code—Art. 178 applies only to applications under Civil Procedure Code (Act XIV of 1882)—High Court Rule 859—Limitation Act (XV of 1877), art. 178.*

on a review of
within the Taxing
...ms; but there is
the interests of
all such cases to
review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

...iefed in a case, and a third is instructed
the case from one Judge to another, and
...kes no provision as to costs, the costs should
and party, though they may be allowed

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circumstances could they constitute a joint Hindu family, or, in that capacity, hold property. In the third case, property is qualified in a two-fold manner: it must have been joint family property and it must be ancestral.

There must have been a nucleus of joint family property before ancestral joint-family property can come into existence, because the word ancestral connotes descent and therefore pre existence. But because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property it is *not* true that there cannot be joint-family property, without a pre-existing nucleus, for that would be identifying joint family property, with ancestral joint family property.

Where there is ancestral joint-family property every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or disposition of any kind This is equally true of joint-family property.

Where it is known or admitted that some at least of the property of a joint family has come down to them the presumption is that the whole property is ancestral, and any member alleging that it is not, will have to prove his self-acquisition.

Where property is admitted or proved to be joint-family property, it is subject ... ot as property which is admitted ... Further, this class of property ... al characteristics from the joint

The fundamental principles of the Hindu joint-family is the tie of Sapindaship. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together it is almost impossible not to form a joint Hindu family.

KARSONDAS DHARAMSEY *v.* GANGABAI ... ... (1908) 32 Bom. 479

HINDU LAW—*Debt—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree.*] The plaintiff obtained a decree ... ntiff's property caused by a ... ago of water thereto. On ... rced against his son with

Held, that the son was not liable under Hindu Law under the decree His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any express provision of the law; but the result of the suit showed that it was wrongful, and for a liability so incurred the son could not be held answerable when the estate that had come to his hands had derived no benefit from the act.

... for debts which the father ... incurred. He is answerable ... not for those attributable to

DURBAR KHACHAR *v.* KHACHAR HARSUR ... (1908) 32 Bom. 348

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HIN... *secs.* 46, 47—
...*uit on behalf*
to the suit—
...half of a joint
the Dekkhan
...of one of the
co-parceners alone: but all the co-parceners joined as plaintiffs and admitted in the plaint that the certificate had been obtained on behalf of the joint family. It was objected to this suit that as the certificate was in the name of one of the plaintiffs the suit could not lie,

Held, overruling the objection, that the certificate obtained by one of the ... of the family at the time the ... obtained it with the consent ... ent, was sufficient to support ...

... represented in all transactions ... (manager), provided these are ... that any co-parcener who does ... and bind the family in such ... previously authorized to repre... other co-parceners subsequently by words or conduct ratified his acts.

VITHU DHONDI *v.* BABAJI ... ... (1908) 32 Bom. 375

... *...alified heir—Exclusion from ... texts.*] The wife or widow ... f inheriting property merely ... her she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance under Hindu law.

... a special text forming an ... and applied only to the ...

PER CURIAM—According to a well-known rule of interpretation in Hindu Law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text.

GANGU *v.* CHANDRABHAGABAI ... ... (1907) 32 Bom. 275

... *Hindu family—Minor co-parceners*— ...

co-parceners are minors.

Virupakshappa v. *Nilgangava* (1894) 19 Bom. 309, applied.

Bindaji v. *Mathurabai* (1905) 30 Bom. 152, followed.

RAMCHANDRA *v.* KRISHNARAO ... ... (1908) 32 Bom. 259

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letter. S, a friend of the accused, had made a statement to a Police Officer which the latter had taken down in writing. At the trial S. denied having made the statement whereupon the Presiding Judge admitted the statement in evidence ... contained statements ... hese confessions were ... Counsel the Advocate ... Patent that the said document was wrongly admitted. On a review of the Full Bench,

... the Criminal Procedure Code (Act V of ... have been admitted or used in evidence

The question was also raised by Counsel for the Crown whether under clause 26 of the Letters Patent the Court had power to review the case only *qua* the wrongly admitted evidence or had power to review all the rest of the case.

Held, by RUSSELL, AG. C. J., CHANDAVARKAR and BATTY, JJ. (DAVAR and BEAMAN, JJ., dissenting) that the Court has power to review the whole case.

Per DAVAR, J. —Under clause 26 the Court is at liberty to review the case or part of the case for the purpose of determining the point or points of law which are either reserved for its opinion or certified by the Advocate General to be wrongly decided. It is not open to the Court in review to go behind the record of the case and enter into an elaborate investigation as to whether each particular piece of evidence recorded by the Judge was or was not rightly admitted.

... a certificate in ... he trial at the

... (1907) 32 Bom. 111

Council under clause (*a*) or (*b*) of that section.

Sunder Koer v. *Chandishwar Prasad Singh* (1903) 30 Cal. 679, followed.

KARSONDAS v. GANGABAI ... ... (1907) 32 Bom. 108

LIMITATION ACT (XV OF 1877), SEC. 10—*Trust for a specific purpose, of the expression—Express trust—English law—Palla money deposited with bride's father—Misappropriation of the sum—Suit to recover the money—L tation.*] The plaintiffs were husband and wife. A sum of Rs. 356, being amount of the female plaintiff's *palla* or dowry, was, on the occasion of her

barred by limitation,

Held, that section 10 of the Limitation Act (XV of 1877) applied to the and that it was, therefore, not barred.

Section 10 of the Limitation Act (XV of 1877) ...
to its a
has bee
or assig
property

The phrase "trust for a specific purpose" in section 10 of the Act is merely more expanded mode of expressing the same idea as that conveyed by the expr sion "express trust" in English law. It is used in the section in contr distinction to trusts arising by implication of law, trusts resulting and trus constructive.

The meaning of the expression "following the property" discussed explained.

BHURABHAI *v.* BAI RUXMANI ... ... (1908) 32 Bom

——— SEC. 10, SCH. II, ART. 120—*Will—Executor—Intermeddling with estate—Degree of interference necessary to charge executor—Suit for account against executor—Account on footing of wilful default—Practice.*

See WILL ... ...

——— SEC. 12—*Presentation of memoranda of appeals, applications and appeals in execution proceedings—Accompaniments extraneous—Civil Procedure Code (Act XIV of 1882), sec. 652—High Court Rules, Chapter V, Part V, Rules 17, 18 and 25.*

See HIGH COURT RULES ... ...

——— SEC. 19—*Acknowledgment—Essentials of a valid acknowledgment—Acknowledgment contained in a written statement—It need not be addressed to any one.*] On the 11th July 1900, a decree was passed against the defendant directing him to pay a certain amount in fixed instalments: the whole amount became payable on default of paying three instalments. The plaintiff presented an application on the 14th July 1903 for execution of the decree for the whole amo
To this, the defendant
date the 28th September
whole amount could not ... as with reference to the second instalment he had deposited its amount with a third person and had given a notice to the plaintiff asking him to take the amount from the third person.
no means to pay its
The Court held that

On the 24th September 1906, the plaintiff gave another darkhast to recover the amount of the aforesaid two instalments, which remained unpaid. The Subordinate Judge dismissed the darkhast as time-barred.

Held, that the statement by the defendant as to the second instalment was an acknowledgment of liability within the meaning of section 19 of the Limitation Act (XV of 1877).

Held, further, that the statement by the defendant as to the third instalment that he was unable to pay and that he would pay if time were given to him, was a distinct acknowledgment of his liability.

Held, therefore, that the second darkhast was within time.

There is nothing in the language of section 19 of the Limitation Act (XV of 1877) to justify the narrow interpretation that the acknowledgment under the section must be addressed to the creditor or some one on his behalf.

SHRINIWAS *v.* NARHAR ... ... (1908) 32 Bom. 296

withdrew from the obstruction
default, without *giving notice*
was passed awarding possession

brought a suit to recover possession of the lands. Both the lower Courts held the suit to be barred under Article 11, Schedule II, of the Limitation Act (XV of 1877).

Held, on second appeal by plaintiff 1, that the suit was not time-barred under article 11, schedule II, of the Limitation Act (XV of 1877), as the minors were not "efficiently represented."

Padmakar Vinayak Joshi v. *Mahadev Krishna Joshi* (1885) 10 Bom. 21, followed.

designed
minors of
protecting
their interest which V. had abandoned without notice to them or to any one on their behalf.

SHIDAPA *v.* VENKAJI ... ... (1908) 32 Bom. 404

——————— SCH. II, ART. 119—*Adoption—Period of Limitation applicable to suits where factum and also validity of adoption is denied.*] Suits in which either the *factum* or validity of an adoption is denied are governed by the provisions of article 119 of schedule II to the *Limitation Act* (XV of 1877).

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respondent as a shareholder in the appellant Bank claimed a right to inspect, ... which the Bank refused ... for if he could satisfy ... a shareholder. Without ... the Bank in which he ... ed in the management of ... ters, and stated that he ... municate with the other ... mprovement in the Bank's ... the ... ed ... py

... hould be treated according to ... mandamus, and in that view ... showed clearly that he had ... interference of the Court, that ... ther, and that his claim had been refused.

In this case there was no statute giving him an unrestricted right, the appellant Bank (which was incorporated under Act XI of 1876) being by section 231 of the Companies Act, 1866, and section 256 of the Companies Act, 1882, expressly exempted from the operation of those statutes.

Taylor on Evidence, 10th Edition (1906), Volume II, paragraph 1495, referred to

On the evidence the respondent had not brought himself within the principles so laid down and his claim should therefore not be allowed

Rex v. *Merchant Tailors' Company* (1831) 2 B. & Ad. 115, followed.

He was not entitled to the extended right given him by the decree of the appellate Court, and the limited and qualified right contended for in the suit was never put forward or insisted on before action brought nor was any claim based on it ever refused.

BANK OF BOMBAY v SULEMAN SOMJI ... ... (1908) 32 Bom. 466

PRESIDENCY SMALL CAUSE COURT ACT (XV OF 1882), SEC 19 (*l*)—*Annuity payable under a will—Assent of executors—Suit to recover arrears—Presidency Small Cause Court—Jurisdiction.*] A suit to recover arrears of an annuity payable under a will and assented to by executors is cognizable by the Presidency Small Cause Court. Such a suit is a suit for money had and received by the defendant for the use of the plaintiff and it does not fall under section 19 (*l*) of the Presidency Small Cause Court Act (XV of 1882).

DOSSIBAI v COOVERBAI ... ... (1908) 32 Bom. 575

PRESSING FACTORY—*Partnership—Transfer of a share in consideration of a certain sum—Document—Release—Conveyance on sale of property—Stamp Act (II of 1899), art. 23.*

See STAMP ACT 505